STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 96-510

December 4, 1996

AT&T OF NEW ENGLAND, INC.
NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY D/B/A NYNEX
Requests for Arbitration Pursuant
to Section 252(B) of the
Telecommunications Act of 1996

COMMISSION DECISIONS ON
ARBITRATED ISSUES

WELCH, Chairman; NUGENT and HUNT, Commissioners

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PLEASE NOTE: The regular text below constitutes material authored by the Maine Public Utilities Commission. The awards of the New Hampshire Arbitrator are printed in *italics*.

I. INTRODUCTION

On August 9, 1996, both AT&T Communications of New England (AT&T) and New England Telephone and Telegraph Company d/b/a NYNEX (NYNEX) filed petitions for arbitration with this Commission under the federal Telecommunications Act of 1996. On September 26, 1996, the Hearing Examiners issued a Procedural Order on "Intervention; Procedures" that memorialized discussions at a prehearing conference held on September 20, 1996. That Procedural Order stated that "[a]s a starting point, the Commission will use the decisions of the Arbitrator (Paul Hartman) in the arbitration proceeding now taking place between NYNEX and AT&T before the New Hampshire Public Utilities Commission," and described the process that the Maine Advisors would follow. An initial Examiners' Report (Part A) was issued on November 13, 1996, that incorporated issue-by-issue recommended decisions on all arbitrated issues for which an award was granted by the New Hampshire Arbitrator as of November 12, 1996. An Examiners' Report (Part A) Supplemental was issued on November 14, 1996 to update Issues 28 and 34(c). An Examiners' Report (Part B) was issued on November 21, 1996, to incorporate recommended decisions on arbitrated issues for which an award was granted by the New Hampshire Arbitrator since November 12, 1996.

References in the New Hampshire Arbitrator's awards to New Hampshire and the New Hampshire Public Utilities Commission should be taken to represent Maine and the Maine Public Utilities Commission, as applicable.

In this proceeding, the Commission has decided issues presented to us for arbitration under 47 U.S.C. § 252(b). 47 U.S.C. § 252(b)(4)(C) requires a state commission to "resolve each issue" presented for arbitration. We have considered each issue as initial decisionmakers. Thus, we have not been bound by and do not perform only a review function of the decisions proposed by the New Hampshire Arbitrator or our Hearing

Examiners' Reports. As the arbitrators, we have adopted, rejected or modified those decisions as appropriate. The parties argued that we have correctly interpreted our powers and duties under the Act.

Although we are resolving arbitrated issues, we have not been presented with contract language or other agreements that would implement these decisions or negotiated issues. 47 U.S.C. § 252(e)(1) requires us to review any agreement arising from or based upon our arbitration decisions. We believe that a reasonable interpretation of 47 U.S.C. § 252(e)(4) requires us to approve any such agreement within 30 days measured from the date of presentation to us for approval.

Although many of the decisions contained in this document are based upon, or fully adopt, the awards of the New Hampshire Arbitrator, we do not necessarily adopt all of the analysis and other comments of the New Hampshire Arbitrator. We do, however, unless otherwise stated, adopt all the logic and record support essential to each decision articulated by the New Hampshire Arbitrator.

II. DECISIONS

A. Issue 1 - Resale of Public Access Lines (PAL)

1. Award of the New Hampshire Arbitrator

Description of issue:

AT&T has requested resale of NYNEX PAL.

Per the Act and FCC rules, all incumbent LECs have the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Restrictions, such as class of subscribers, may apply, but are not at issue in this case. (51.605 and 251c4)

For these issues there is a three part test. First is this *a retail service provided to subscribers? Secondly, what is exactly is this retail service. Third, is it being bought by an "resale" eligible carrier, i.e., telecommunications carrier?*

Parties Positions:

Both AT&T and NYNEX agreed that PAL is a retail service provided to subscribers. Secondly, PAL service is a service ordered by an end user and paid for by an end user. Furthermore NYNEX does not have unilateral discretion as to placement of the PAL facilities. It is available at the customer's option, not NYNEX's. Third, it is being bought by a telecommunications carrier - AT&T. Therefore it appears that PAL should indeed be available for resale at wholesale rates. Both AT&T and NYNEX agree that PAL is a service subject to resale at wholesale rates, except that NYNEX does not believe that AT&T can resell PAL for use by its own payphone affiliate.

NYNEX bases this argument on paragraph 875 which states that section 251(c)(4) does not require incumbent LECs to make services available for resale at wholesale rates to parties who are not "telecommunications carriers" or ***who are purchasing service for their own use****. (Emphasis added) Therefore NYNEX objects to reselling PAL to AT&T for use of AT&T's own pay telephone affiliate.*

NYNEX cites paragraph 876 as further support for its argument. NYNEX also points to a pending FCC order on the implementation of Section 276 Provision of Payphone service will clarify or at least change this issue.

NYNEX also argued that if AT&T were able to buy PAL at a discount for its own use, AT&T would have a competitive advantage by virtue of its affiliate receiving the resale discount while another similarly situated independent payphone provider would not be able to receive this "resale" discount. Therefore in order to avoid the creation of a discriminatory third party effect, NYNEX argues that AT&T should not be able to buy PAL for resale for its own use.

Arbitrator's Analysis:

In order to more fully understand NYNEX's line of reasoning, it is important to look at the context of paragraph 875. It appears that 875 is the concluding paragraph for the FCC's`discussion about whether exchange access service is subject o resell at a discount to interexchange carriers. The FCC concludes in paragraph 874 that because exchange access would be used by an interexchange carrier for its own use, an interexchange carrier is not entitled to buy exchange access as a resold service at wholesale rates. In paragraph 874, there is the following linking language to paragraph 875. "Furthermore, as explained in the following paragraph..." In this context it appears that paragraph 875 is simply expanding the specific case of exchange access as an interexchange carrier bought service for its own use to a more general case of any service that is bought for its own use.

NYNEX also advances the argument that paragraph 876 specifically states that independent payphone providers (IPP) are not telecommunications carriers. Since AT&T's own pay telephone affiliate is acting like an IPP, NYNEX argues, that portion of AT&T's business should no longer be treated as a telecommunications carrier, but rather an IPP. AT&T seems to argue that because it is clearly a telecommunications carrier in one area, it must also be a telecommunications carrier in all areas.

When determining whether a telecommunications carrier is a common carrier both the 1996 Act and the FCC reach the conclusion that even if a telecommunications carrier is a common carrier in one area, its entire operations may not necessarily be common carrier. In that definition (47 U.S.C. 153 (r)(49)), it was clear that all common carriers are telecommunications carriers, but that not all portions of a telecommunications carriers may necessarily be common carriers. It appears that a telecommunications carrier can be both a common carrier and a non-common carrier. It all depends on which service is provided. By that reasoning, it would be logical that if a *telecommunications carrier had an IPP operations, and IPP carriers are not telecommunications carriers, then for that portion of their business, AT&T would be considered an IPP and therefore would not be eligible to buy PAL from NYNEX as a resold service at a discount for use by its "IPP" affiliate.*

The arbitrator also agrees with NYNEX that an unwanted and unwarranted creation of a third party effect would occur if NYNEX were required to resell PAL service at a discount to AT&T for its own use.

It was noted in discussions that PAL does not contain any "bundled" screening features in order to deter fraud. However, NYNEX acknowledged that these features are available from another tariff and agreed that they would be available for resale at wholesale rates.

AWARD

NYNEX is not required to sell PAL for resale to AT&T at a discount for AT&T's own use. This award was not affected by the FCC order on Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC96-128 and CC91-35, released September 20, 1996.

2. <u>Decision</u>

We adopt the final award of the New Hampshire Arbitrator.

B. <u>Issue 2 - Resale of Public Payphone at a Discount</u>

1. <u>Award of the New Hampshire Arbitrator</u>

Description of issue:

AT&T has requested resale of NYNEX Public Pay Telephone Service

Per the Act and FCC rules, all incumbent LECs have the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Restrictions, such as class of subscribers, may apply, but are not at issue in this case. (51.605 and 251c4)

For these issues there is a three part test. First is this a retail service provided to subscribers? Secondly, what exactly is this retail service? Third, is it being bought by a "resale" eligible carrier, e.g., a telecommunications carrier?

Parties positions:

Both AT&T and NYNEX agree that there is a retail service associated with public pay telephone that is provided to subscribers. The key issue is what exactly is that retail service that NYNEX provides. AT&T appeared to want to resell the public pay phone facilities. However, the only retail tariff that was produced regarding pay phone was one governing the USE of the pay phone for local coin service. The retail tariff did not include and offering of public pay phone facilities. Therefore, NYNEX argues that it is not required to sell public pay phone facilities to AT&T.

NYNEX also argues that a pending FCC order on the implementation of Section 276 Provision of Payphone service will clarify or at least change this issue. It was agreed by both AT&T and NYNEX that when the FCC payphone order became available, any relevant portions would be incorporated into this decision.

Arbitrator's Analysis:

Public payphone service appears to be a unique service in that the end user of the service (coin customer) is not the one that orders the facilities necessary for the service. After discussion it seems clear that public payphone are placed (and removed) at the sole discretion of NYNEX. The only apparent tariff that references public payphone does not relate to *facilities, but rather service. At paragraph 872, the FCC order states that State Commissions can determine the services that an incumbent LEC is obligated to provide at wholesale rates by examining the incumbent LEC's retail tariff. Since NYNEX's tariff does not include the public payphone facilities, it is clear that NYNEX cannot be required to offer them for resale.*

Another indication that public payphones are not themselves a retail service available to end users is the fact that currently there is no interstate end user charge applied to public payphones.

AWARD

Based on the recent FCC order concerning the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC96-128 and CC91-35, released September 20, 1996, there will be a retail tariff that will allow NYNEX to offer the public payphone line without the terminal equipment to its pay telephone service provider. This tariff will be available to AT&T. Due to the above referenced FCC order, the above analysis is no longer relevant.

2. Decision

We adopt the final award of the New Hampshire Arbitrator. We believe, however, contrary to Mr. Hartman's suggestion, that his analysis remains relevant, although we agree it has been superseded and made moot by the FCC order.

C. Issue 3 - Resale of Semi-Public Payphone at Wholesale Rates

1. Award of the New Hampshire Arbitrator

Description of issue

AT&T has requested resale of NYNEX Semi-Public Pay Telephone Service

Per the Act and FCC rules, all incumbent LECs have the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Restrictions, such as class of subscribers, may apply, but are not at issue in this case. (51.605 and 251c4)

For these issues there is a three part resale test. First is this a retail service provided to subscribers? Secondly, what exactly is this retail service? Third, is it being bought by a "resale" eligible carrier, e.g., a telecommunications carrier?

Parties' Positions:

Both AT&T and NYNEX agree that Semi-Public payphone is a retail service. In addition both agree that there is a retail tariff that makes the facilities available per the tariff. However AT&T indicated that it wanted to resell a NYNEX retail service that is more unbundled than at present.

NYNEX also argues that a pending FCC order on the implementation of Section 276 Provision of Payphone service will clarify or at least change this issue.

Discussion

The only issue appears to be whether NYNEX is obligated to unbundle and rebundle a retail service on request from a new entrant who want to purchase the rebundled service at wholesale for resale to end users. This rebundled service is a new retail service that is not currently available to end users. Therefore the rebundled service is not a candidate for purchase at a discount rate under the resale provisions. In other words, if a service eligible for resale is a "packaged" service, any requested unpacking that creates a new service that is not offered to subscribers and therefore is not required to be offered at a wholesale price for resale.

AWARD

Based on the recent FCC order concerning the Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC96-128 and CC91-35, released September 20, 1996, that there will be a retail tariff that will allow NYNEX to offer the semi-public payphone line without the terminal equipment to its pay telephone service provider. This tariff will be available to AT&T. Due to the above referenced FCC order, the above analysis is no longer relevant.

2. Decision

We adopt the final award of the New Hampshire Arbitrator. We believe, however, contrary to Mr. Hartman's suggestion, that his analysis remains relevant, although we agree it has been superseded and made moot by the FCC order.

D. Issue 4 - Reservation of Space in Rights of Way, Conduits and Poles

1. Award of the New Hampshire Arbitrator

Issue:

This issue is simply, how much space in rights of way, conduits and poles should NYNEX be able to reserve for its own future use. Since space on rights of way, conduits and poles is a limited and valuable commodity, excessive reservation by NYNEX could be detrimental to new entrants while not enough reservation by NYNEX could be detrimental to NYNEX. While this issue was only raised with regards to NYNEX, it applies to all telecommunications carriers needing space on rights of way, conduits and poles.

Parties' Positions:

NYNEX states that it must be able to reserve up to 5 years of projected space requirements because the traditional construction cycle is that long. AT&T, on the other hand, argues on the basis of Paragraph 1170 of the First Report that any *reservation of space could be detrimental to a new entrant and therefore NYNEX should not be allowed any reservation.*

NYNEX asserts that the definition of the term "premises" in CFR 47 Part 51 supports its argument for a 5 year reservation. Per NYNEX, since the definition of "premises" mentions rights of way; "premises" is a term used in collocation; collocation contains a 5 year reservation of space; therefore, NYNEX argues, a 5 year reservation should likewise be allowed for rights of way, conduits and poles.

During discussions it was noted that having zero reservation and only relying on current needs could present problems for both new entrant and incumbent LEC. At the extreme, this zero reservation could be interpreted that if the requested space is not used within some very short time frame, such as 24 hours, then the request is for a future reservation of space. When taken to this extreme, this clearly will not work for either the new entrant or NYNEX because it would require that equipment, material and labor would have to be at the job site and ready to roll BEFORE space would be granted, which could cause the situation that everything is on site but when the space request was requested, there was no space available. Clearly the definition of "current needs" must be carefully established.

Arbitrator's Analysis:

NYNEX, as the incumbent, has an obligation and a right to provide service; any new entrant has the right to provide service. In situations where both need to use the limited and valuable right of way, a detriment would be likely for either party if space were not available.

While it might be tempting to merely "split the difference" and award something half way between 5 years and zero, this issue is too important for such a simplistic solution. What is required is a process whereby these situations can be expediently and fairly handled on a case by case basis.

It would seem reasonable that any new entrant that applies for use of NYNEX rights of way, conduits and poles must apply in writing with the specific request including what detriment, if any, not granting the request would have. NYNEX would have 30 days to reply in writing. If space is available, then there is no problem. However in the cases where sufficient space is not available, NYNEX must also supply in the written reply the reason the request in not being granted. The reason must be specific and include the following: total capacity of the relevant system, amount currently in use and the amount reserved for future use. In addition the amounts currently in use must specify if the space is being used to provide "non-revenue producing" services. For example, NYNEX must identify if any currently occupied space is being used for "dead" equipment which may not have been removed yet. The amounts reserved for future use must indicate who has reserved the space and the intended time period for the start of utilization. Furthermore, NYNEX must offer any alternative solutions that may be available, including but not limited to conduit sharing, and removing the "dead" cable.

This must all be in writing and available for public inspection. The requesting party then has the right to request "fast track" arbitration. This means that there must be available a means whereby the requesting carrier can take this information and have an impartial hearing to determine what can be done, if anything. This second phase should take no longer than 20 days so that the entire process will be resolved in 50 days. Because accurate information will be needed very quickly in order to have an effective arbitration, the requesting carrier has the right to contact any similarly competitive LEC for inclusion in this arbitration. This may be helpful in determining actual growth in the area and better determine the needs for the future.

While this issue started out as directly effecting a new entrant and NYNEX, this situation could very well involve two new entrants needing NYNEX's available space. In that case, NYNEX as the administrator needs to have a way to impartially resolve this dispute between two new entrants. The above framework would also *be applicable.*

AWARD

No specific time frame for reservation of space is awarded. Rather a process that was outlined above is awarded.

2. Decision

We adopt the final award of the New Hampshire Arbitrator.

E. Issue 5 - Branding of Operator Services and Directory Assistance

1. Award of the New Hampshire Arbitrator

Issue:

NYNEX currently brands calls to its Operator Services and Directory Assistance. AT&T has requested that NYNEX rebrand Operator Services and Directory Assistance Services (OSDAS) calls with the AT&T name when such services are provided to AT&T customers by NYNEX, or if rebranding is not possible then AT&T requests NYNEX to unbrand all calls (both NYNEX and non-NYNEX) to NYNEX's OSDAS.

Parties' Positions:

AT&T asserts that, pursuant to the Telecommunications Act of 1996 (the Act) and the FCC First Report and Order in the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 - CC96-98 - FCC96-325, August 8, 1996 (the First Report), NYNEX must either provide rebranding or unbrand all calls to its Operator Services and Directory Assistance including those from its own customers until such time that NYNEX can rebrand AT&T's customers' calls to NYNEX's OSDAS as an AT&T service. AT&T claims that rebranding is technically feasible now.

NYNEX's position is that rebranding in a resale environment is not technically feasible at this time. Therefore, both NYNEX and non-NYNEX customers hear a message identifying NYNEX as the OSDAS provider. NYNEX asserts that rebranding will not be technically feasible until after January 1, 1998, when the Advanced Intelligent Network (AIN) is deployed. At that time rebranding for AT&T can be accomplished via AIN. In the meantime, NYNEX maintains that neither the Act nor the First Report, e.g., Section 51.613(c), requires NYNEX to unbrand its own OSDAS in the event that it is not feasible to provide rebranded OSDAS for AT&T customers.

NYNEX indicates that an interim solution of unbranding new entrant customer's traffic to NYNEX OSDAS will be technically available, by June 1, 1997, using line class codes to provide separate trunks for NYNEX vs. non-NYNEX customers. As a result of the interim solution, NYNEX customers will continue to hear a NYNEX brand message but non-NYNEX customer will hear no brand message at all. Upon further questioning it was established that it is currently technically feasible for NYNEX to unbrand all traffic on its OSDAS, i.e. unbranding both NYNEX and non-NYNEX OSDAS. It was also acknowledged that portions of the current network are not equipped to handle multi-vendor applications.

AT&T counters NYNEX's argument, claiming that Section 51.613(c)(2) requires NYNEX to unbrand all customers. Per Section 51.613(c)(2), unbranding means that the "incumbent LEC's brand name or other identifying information is not identified to subscribers." AT&T argues that the subscribers to whom the brand name is not identified include NYNEX customers as well as customers of new entrants who utilize NYNEX's OSDAS.

AT&T also claims that paragraph 970 of the First Report requires that "service made available for resale be at least equal in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the carrier directly provides the service, such as end users". Therefore, if NYNEX cannot provide rebranding for AT&T's customers, then it should not be able to provide branding for its *customers.*

Arbitrator's Analysis

As stated above, NYNEX does not have a currently available solution in place now to even provide unbranding for the new entrant's customers and will not have the AIN solution for rebranding deployed until around January 1, 1998. Upon further discussions concerning the interim solution per the utilization of line class codes, it was determined that NYNEX probably did have the capability to provide rebranding for at least some of the expected new entrants that may want to resell NYNEX's OSDAS via line class codes. However, NYNEX claimed that it forecasts that the demand for line class codes for this and other services would exceed capacity and that therefore NYNEX would be unable to provide rebranding for all new entrants. Since NYNEX would not have enough line class code available for <u>all</u> of the anticipated users of rebranding, NYNEX argued, NYNEX should not have to provide rebranding to <u>any</u> new entrant via line class codes.

In short, NYNEX was arguing that if NYNEX could not provide rebranding for all expected new entrants, then it did not have to provide rebranding service to any new entrant. This is similar to arguments made in the "reservation" issue which was arbitrated on September 16, 1996. The issue in that case concerned rights of way, conduits and poles. Translating the above situation into a conduit issue, it is as though only one vacant conduit exists and four new entrants each requested the use of the entire conduit. Applying NYNEX's above logic, NYNEX argued that because NYNEX could not meet the needs of all of the new entrants requesting conduit space, it did not have to meet the needs of any of the new entrants.

Because NYNEX argues that the rebranding is not currently technically feasible and will not be technically feasible until AIN is deployed in 1998, the issue of technical feasibility arises. It is expected that the issue of technical feasibility will be a continuing issue and concern in this arbitration. For that reason, it would be efficient to determine a "decision tree" *approach or in order to aid in the determination of technical feasibility and possible remedies. Although the technical feasibility decision tree may not apply to all circumstances, it may apply to many and it will be applied to the instant issue of branding.*

The decision tree consists of five questions. First, is the ILEC technically capable of providing it to anyone, including itself? If the answer is no, then the inquiry ends. If the answer is yes, the second question arises: is NYNEX providing it to itself? If the answer is no, then there may be no harm if NYNEX is providing the service to others or is willing to provide it. If the answer is yes, then the inquiry proceeds to the third question: is a new entrant requesting it? If the answer is no, then the inquiry ends. If the answer is yes, then the fourth question arises: does NYNEX agree to provide it now? This time the inquiry ends if the answer is yes. But, if the answer is no because of technical infeasibility, the question to be determined is the level or true extent of the claimed technical infeasibility.

There are three levels of technical infeasibility to provide a service to a new entrant. Level 1 is when there is a solution available that has not been deployed by the ILEC. Level 2 is when there is no solution available to provide the service to the new entrant. Level 3 is when there is an available solution which has been deployed by the ILEC but which can only accommodate a limited number of users.

In either Level 1 or Level 2 situations, inferior service is being provided to the new entrant as compared to that enjoyed by NYNEX. Appropriate steps are necessary to provide motivation for the ILEC which would otherwise have no incentive to seek a technical solution. In a Level 1 situation, when there is an available solution that has not been deployed by the ILEC, steps should be taken to encourage the ILEC to deploy the available solution in a reasonable timeframe. In a Level 2 situation, when there is no solution available whatsoever, steps should be taken to encourage the ILEC to develop a solution in a reasonable *timeframe.*

One way to encourage the ILEC to deploy an available solution is to not allow the ILEC to continue to utilize this feature, function or service. For example, in the case of branding, if NYNEX cannot provide rebranding for the new entrant's customers, then NYNEX should not enjoy the competitive advantage that the exclusive branding for its own customers would provide. Further, NYNEX should not be permitted to misbrand as NYNEX services those provided on a resold basis by AT&T.

It is noted that the above-described unbranding represents a purposeful degradation of service. Such a degradation of service would not be appropriate in cases involving essential network functionalities, i.e. network reliability. NYNEX must be able to continue utilizing the essential feature, function, or service despite the possibility of the new entrant being placed in a detrimental position as a result of the inferior service provided to the new entrant. In other words, if the feature, function or service is essential to the quality of the network, then it cannot be purposely degraded.

Another way to encourage the ILEC to find and deploy a solution is the historical one for inferior service: the application of a discount. This discount would be above and beyond any other discount and could last for the duration of the "inferior" service. While a general, across the board allocator could be used, e.g., 10%, a more ideal solution would be to base this discount factor on the reduced market value of the service due to the inferior feature, function or service received from the incumbent LEC. In most cases, the discount factor would be applied for the duration the "inferior" feature, function, or service is used by the new entrant. This discount factor would need to be set.

In a Level 3 situation, when there is an available solution which has been deployed by the ILEC but which can only accommodate a limited number of users, then the basic principles of the "reservation issue regarding right of way" process is *applied. The general principle is that this will be handled on a first come first served basis until there is no more available. Once there is no more available, the process outlined below applies, which is similar to that in the above referenced right of way "reservation" arbitration.*

Any new entrant that is requesting a particular service, e.g., rebranding, must apply in writing for resale of specific features, functions, and services. The written application must include a description of the detriment, if any, denial of the request would have. If granting the request is possible, NYNEX would have to respond in writing as soon as possible, granting the request. If supplying the request is not technically feasible, NYNEX must respond within 30 days, providing the reason the request is not being granted. The reason must be specific and include the following: total capacity of the relevant system, amount currently in use, and the amount reserved for future use. In addition, the amounts currently in use must specify if any of the available capacity is being used to provide "non-revenue producing" services. The amounts reserved for future use must indicate who has reserved the space and the intended time period for the start of utilization. Furthermore, NYNEX must detail in writing any alternative solutions that may be available. In the case of branding, there may be an Automatic Number Identification (ANI) based solution available. The new entrant's request and the NYNEX response must all be available for public inspection.

The requesting carrier then has the right to request "fast track" arbitration. This means that there must be available a means whereby the requesting carrier can take this information and have an impartial hearing to determine what can be done, if anything. This second phase should take no longer than 20 days so that the entire process will be resolved in 50 days. Because accurate information will be needed very quickly in order to have an effective arbitration, the requesting carrier has the right to contact any similarly situated competitive LEC for inclusion in this arbitration. Unlike the right of way reservation case, the arbitrator may order that a discount is appropriate based on either a specific study of harm or a general percentage. In that *way, the requesting carrier would not receive some allocation of a portion of branding but would, instead, receive a discounted rate for "inferior" service.*

Applying the above analysis results in a conclusion that the branding issue is currently a Level 2 situation and will become a Level 3 situation at the time that line class codes are available to provide separate trunks for NYNEX vs. non-NYNEX customers. During the Level 2 situation, NYNEX is required to unbrand its OSDAS because of the requirements of Paragraph 970 of the First Report and because the timeframe is too short to utilize a discount process efficiently. During the Level 3 situation, NYNEX is required to rebrand for any new entrant on a first come first served basis.

Award

If at the time AT&T asks for delivery of branding, NYNEX is incapable of delivering branding because there is no solution available to the technical feasibility problem, as is currently the case, a Level 2 situation exists. The Level 2 situation will continue to exist until line class codes are available to provide separate trunks for NYNEX vs. non-NYNEX customers, at which time a Level 3 situation will arise. For the duration of this Level 2 situation, NYNEX shall unbrand its OSDAS. Unbranding is necessary both because of the requirements of Paragraph 970 of the First Report and because the timeframe is too short to utilize a discount process efficiently.

During the Level 3 situation, which will commence at the time line class codes are available to provide separate trunks for NYNEX vs. non-NYNEX customers, NYNEX shall rebrand OSDAS for any new entrant on a first come first served basis. In the event that NYNEX becomes unable to provide rebranding to any new entrant, the arbitration process outlined above will be precipitated, similar to the right of way "reservation" arbitration process but including consideration of an award of discounted rates.

Technical Feasibility Decision Tree Applied to Branding

(1) Can NYNEX do it at all?

No

Yes, (2) Is NYNEX providing it to itself?

No

Yes, (3) Is a new entrant requesting it?

No

Yes, (4) Will NYNEX provide it?

Yes

No, (5) What level is it?

Level 1: ***NA***

Level 2: ***Yes,*** *until line class code solution;*

remedy: unbrand

Level 3: ***Yes,*** *after line class code solution remedy: 1st come 1st served until arbitration is triggered*

2. Decision

We adopt the final award of the New Hampshire Arbitrator with the following modifications. We will not require NYNEX to unbrand any traffic, including its own between now and June 1, 1997. We do not believe there is reason to require NYNEX to intentionally degrade its service to its own end use customers considering that only small volumes of traffic attributable to AT&T customers are expected to develop before June 1, 1997. If NYNEX cannot unbrand traffic attributable to AT&T customers by June 1, 1997, then it shall unbrand all traffic, including that to its own end use customers, until it unbrands service provided to AT&T customers. Similarly, NYNEX must unbrand all traffic, including its own, if it does not provide "rebranding" to AT&T (upon request) on or before January 1, 1998. In our view, this condition will provide ample incentive for NYNEX to put the necessary technology in place in schedule.

F. Issue 6 - Alternate Billing to Third Number

1. Award of the New Hampshire Arbitrator

Issue:

Normally, a message is billed to the number that originated the message. The situations addressed in this arbitration involve alternate billing to a "third" number, a number other than the originating number. Credit card, collect call, and charges billed to a third number (number other than the originating or terminating) are examples of third number billed messages. The issue here involves third number billing for local, not toll, messages which deal with a customer of AT&T as a result of AT&T reselling NYNEX local services.

AT&T and NYNEX agree that there are four basic scenarios for third number billing of local messages involving an AT&T local-customer-by virtue-of-resale. All of the four scenarios deal with actual resale, <u>not</u> the use of unbundled elements or AT&T facilities-based services. For each of the four scenarios, AT&T and NYNEX disagree as to the proper method for billing. The disagreement extends to which company should receive payment, how much payment, and the path for billing information.

Parties' Positions:

The four scenarios can be categorized into two groups of two. The first two scenarios are exemplified by a regular collect call in which the call is billed to the terminating number; the second two scenarios are exemplified by a call billed to a number other than the terminating or originating number.

For each of the four scenarios, AT&T and NYNEX present conflicting billing processes, each based upon the same conflicting arguments. AT&T argues that the processes it proposes are approximately equivalent to that used in toll billing. The AT&T billing process is most efficient if it can apply uniformly to both toll and local for third-number billing. Therefore AT&T contends that its processes should be adopted for purposes of third-number billing in the interconnection agreement. NYNEX argues that the third-number billing issue does not turn on efficiency of processing but on the actual relationships that result from AT&T's resale of NYNEX services pursuant to the Act and as interpreted in the First Report.

In the first scenario, a caller originates an in-region local call from an AT&T local-customer-by-virtue-of-resale, that is served in a NYNEX exchange, and bills it to the terminating number which is a local customer of NYNEX. For example, a caller makes a call from a friend's house in Portsmouth to another friend in Hampton, charging the call to her friend in Hampton. The Portsmouth house belongs to an AT&T local-customer-by-virtue-of-resale and the Hampton friend is a local customer of NYNEX. The billing process suggested by AT&T and NYNEX for this scenario are compared below, side by side and step by step.

Scenario # 1

ORIGINATOR: AT&T (AT) Customer by-virtue-of-Resale — *BILLED TO: NYNEX (NX) Customer*

NYNEX PROCESS	*AT&T PROCESS*
1. NX records & handles call	*1. NX records & handles call*
2. NX rates call at NX rate	*2. NX sends UNRATED message to AT*
3. NX bills call to its customer	*3. AT rates message at AT rate*

4. AT <u>returns</u> rated message to NX for B&C

5. AT <u>pay</u> NX 5¢ for B&C*

6. NX <u>remits</u> "net" $ to AT

** Note: the 5 cents for B&C is merely a convention for these examples and may not represent actual charges.*

AT&T argues that their billing process is most efficient if it can handle calls in a similar way for all third party calls, both local and toll. The AT&T process is approximately equivalent to that used in their toll billing and would be therefore more efficient from a processing standpoint. NYNEX argues that processing costs are not the issues but rather the particular required relationship between NYNEX, AT&T and AT&T's customer as a result of AT&T reselling NYNEX services as pursuant to the Act and FCC's First Report.

In the second scenario, a caller originates an in-region local call from a NYNEX local customer location and bills it to the terminating number which is an AT&T local-customer-by-virtue-of-resale who is served in a NYNEX exchange. For example, a caller from a friend's house in Laconia makes a call to another friend's house in Meredith, charging the call to the friend in Meredith. The Laconia house belongs to a NYNEX customer and the other friend in Meredith is an AT&T customer-by-virtue-of-resale. The billing process suggested by AT&T and NYNEX for this scenario are compared below, side by side and step by step.

Scenario # 2

ORIGINATOR: NYNEX (NX) Customer	*BILLED TO: AT&T (AT) Customer-by-virtue-of-resale*
NYNEX PROCESS	*AT&T PROCESS*
1. NX records & handles call	*1. NX records & handles call*
2. NX sends AT unrated call - daily	*2. NX rates call at NX retail rate*
3. NX bills AT @ wholesale rate (rated less discount) monthly	*3. NX sends rated retail call to AT for B&C*
4. AT rates call at "AT&T" retail rate	*4. AT charges NX 5¢ for B&C*
5. AT bills customer	*5. AT remits "net" $ to NX*

AT&T argues that their billing process is most efficient if it can handle calls in a similar way for all third party calls, both local and toll. The AT&T process is approximately equivalent to that used in their toll billing and would be therefore more efficient from a processing standpoint. NYNEX argues that processing costs are not the issues but rather the particular required relationship between NYNEX, AT&T and AT&T's customer as a result of AT&T reselling their services as outlined in the Act and the First Report.

In the third scenario, a caller originates an in-region local call from an AT&T local-customer-by-virtue-of-resale that is served in a NYNEX exchange and bills it to a terminating number which is out-of-region. For example, a caller in Laconia calls a friend in Meredith, charging the call to a number in California. The caller in Laconia is an AT&T local-customer-by-virtue-of-resale and the out-of-region California number is served by Pacific Bell (PB) for local calls. (The identity of the local service company of the friend in Meredith is immaterial *for purposes of this scenario.) The billing process suggested by AT&T and NYNEX for this scenario are compared below, side by side and step by step.*

Scenario # 3

ORIGINATOR: AT&T (AT) Customer-by-virtue-of-Resale	BILLED TO: Pacific Bell (PB) customer
NYNEX PROCESS	AT&T PROCESS
1. NX record & handle call	1. NX record & handle call
2. NX sends rated call to PB via CMDS	2. NX sends unrated call to AT
3. PB bills & collects call already rated by NX	3. AT rates call at AT tariff rate
4. PB remits net to NX (less 5¢ for B&C)via CMDS transmission	4. AT sends rated call to its CMDS host for to PB via CMDS
	5. PB bills & collects call
	6. PB remits to AT host net (less 5¢ for B&C) via CMDS
	7. CMDS host remit to AT

AT&T argues that their billing process is most efficient if it can handle calls in a similar way for all third party calls, both local and toll. The AT&T process is approximately equivalent to that used in their toll billing and would be therefore more efficient from a processing standpoint. NYNEX argues that processing costs are not the issue but rather the particular required relationship between NYNEX, AT&T and AT&T's customer as a result of AT&T reselling their services as outlined in the Act and the First Report.

In the fourth scenario, a caller originates an out-of-region local call that is billed to an in-region AT&T (AT) local-customer-by-virtue-of-resale that is served in a NYNEX (NX) exchange. For example, a person from Claremont who is visiting a friend in San Francisco makes a call from the friend's house to an acquaintance in another part of San Francisco, charging the local call to her number in Claremont. The San Francisco number is provided with local service by Pacific Bell (PB); the Claremont number is an AT&T local-customer-by-virtue-of resale and is served by a NYNEX exchange. The billing process suggested by AT&T and NYNEX for this scenario are compared below, side by side and step by step.

Scenario # 4

ORIGINATOR: PB Customer	BILLED TO: AT&T Customer via resale in N.H.
NYNEX PROCESS	AT&T PROCESS
1. PB record & rate call	1. PB record & rate call
2. PB transmits via CMDS to NX due to 6 digit translation	2. PB transmits via CMDS to NX due to 6 digit translation
3. NX retransmits to AT via daily usage feed, charging AT record transmission fee	3. NX retransmits to AT via daily usage feed, charging AT record transmission fee
4. NX bills AT full PB rate on monthly bill	4. AT bill & collect their customer
5. NX remits billed rate less 5¢ for B&C to PB (keeps 5¢)	5. AT remits to NX less 5¢ for B&C to PB

6. AT bill & collect their customer

AT&T argues that its billing process is most efficient if it can handle calls in a similar way for all third party calls, both local and toll. The AT&T process is approximately equivalent to that used in their toll billing and would be therefore more efficient from a processing standpoint. NYNEX argues that processing costs are not the issues but rather the particular required relationship between NYNEX, AT&T and AT&T's customer as a result of AT&T reselling their services as outlined in the Act and the First Report.

Arbitrator's Analysis

In choosing an appropriate billing methodology, the key consideration is the specific relationship created in the provision of resold local services in each scenario between (1) AT&T and NYNEX, (2) AT&T's local customer and AT&T, and (3) AT&T's local customer and NYNEX. Even though the AT&T billing methodology may in fact be more efficient from a billing standpoint, the AT&T methodology is not appropriate unless AT&T has the appropriate relationship to the customer.

Also of great importance is the fact that, under the resale provisions of the Act, AT&T resells NYNEX's local services, not facilities. Other provisions of the Act, for providing local service through the use of unbundled network elements or AT&T's own local facilities, involve the sale of facilities, but this issue deals with resale and therefore the sale of services. This distinction between services and facilities is crucial and will be discussed below.

As articulated in three of the arbitrations of September 16, 1996, for resale a three part test applies. First, is this a retail service provided to subscribers? Second, what exactly is this retail service. Third, is the service being requested for resale by a telecommunications carrier as defined in the Act?

In applying the first question of the test in this situation, NYNEX and AT&T agreed that the resold service involved "third number service" contained in NYNEX tariff 77, is provided to subscribers and therefore is available for resale. The second question of the test asks what exactly is the retail service. As indicated in the description, third number billing is distinguished by the fact that a number other than the originating number is being billed. The answer to the third question is yes, for each of these four scenarios AT&T is a telecommunications carrier as defined in the Act.

In the first scenario (a collect call), the terminating customer, who is a NYNEX customer, is the so-called "third number" being billed as outlined in the applicable tariff. The customer having the relationship to the applicable tariff is NOT the originating number, as is the usual case, but rather the third number customer, a NYNEX customer. Since the third number is not an AT&T local customer, neither AT&T nor the originating caller, AT&T's local customer, has a relationship to the applicable NYNEX tariff.

It is at this point that the importance of the distinction between services and facilities becomes clear. Third number service does indeed utilize the same <u>facilities</u> that also are utilized by other local <u>services</u> that are resold by AT&T to the originating number. In other words, if the originating number were an AT&T customer by virtue of a facilities "type" arrangement, e.g., unbundled network elements or actual provisioning of local facilities by AT&T, then <u>all</u> usage over those facilities would be AT&T's. However, under resale, only the usage generated from those NYNEX local services being resold by AT&T are AT&T's. In this scenario, AT&T is not reselling any NYNEX service. Rather, the originating caller is asking the NYNEX customer to pay for the call and allow the call to be completed. The third number (NYNEX) customer, by accepting the collect call, is subscribing to his local telephone company's (NYNEX) service and will be charged for by his local telephone company (NYNEX).

Hence, in scenario #1 there is no NYNEX local service being resold by AT&T to its local-customer-by-virtue-of-resale. AT&T is not involved in this service and is not entitled to any of the revenues. The NYNEX billing methodology follows these principles. Even though the AT&T billing methodology may in fact be more efficient from a billing standpoint, it does not follow these principles.

In scenario #2, there is no disagreement that the service is one provided to subscribers out of a retail tariff and is therefore available for resale. Likewise, for purposes of this scenario, AT&T is a telecommunications carrier as defined in the Act. As in scenario #1, the issue here arises out of the second question in the resale test. The issue again revolves around the relationship between NYNEX and AT&T and the relationship between NYNEX and AT&T's local customer by virtue of resale. Here, unlike the situation described in scenario #1, it is AT&T's local-customer-by-virtue-of-resale which is the third number. Therefore, it is AT&T that provides the service, via resale.

The NYNEX local service is being sold by NYNEX to AT&T so that AT&T can resell the service to the local customer. NYNEX's relationship, therefore, is with AT&T and not with the local customer using the resold service. NYNEX must bill AT&T at the NYNEX "wholesale" rate (retail less avoided cost). AT&T, on the other hand, as the reseller, can bill its customer for this service at its chosen rate for this service. In theory, and ignoring other possible constraints, AT&T can rate this service below, above or exactly equal to the equivalent NYNEX service.

The NYNEX billing methodology follows these principles. Even though the AT&T billing methodology may in fact be more efficient from a billing standpoint and may indeed create less customer confusion, it does not follow these principles.

In Scenario #3, there is no disagreement that the service is provided to subscribers out of a retail tariff and is therefore available for resale. Nor is there disagreement that for purposes of this scenario, AT&T is a telecommunications carrier *as defined in the Act.*

The issue in Scenario #3 turns on the second question in the test: what exactly is the retail service being resold? Scenario #3 is similar in many respects to scenario #1 except that, instead of being billed to an in-region third number, the local call is being billed to a third number which is out-of-region, in this example the number of a customer of Pacific Bell. Since the terminating customer (third number) is not an AT&T local customer, neither AT&T nor the originating customer, AT&T's local customer, has a relationship to the applicable PB tariff. (While it may appear that a further area of dispute may be the relationship of the third number party to Pacific Bell, both NYNEX's billing process and AT&T's billing process treat Pacific Bell in the same manner.) Exactly what amount Pacific Bell bills and to whom PB remits is not a matter for arbitration between NYNEX and AT&T.

The NYNEX billing methodology conforms to the actual relationships between AT&T, NYNEX, and the billed customer and is therefore appropriate for this scenario. Even though the AT&T billing methodology may in fact be more efficient from a billing standpoint, it does not conform to the actual relationships and is inappropriate.

In the scenario #4, a caller originates an out-of-region local call that is billed to an in-region AT&T local customer-by-virtue-of-resale that is served in a NYNEX exchange. As an example, a New Hampshirite visiting California makes a call from a California friend's house to a local California acquaintance and charges the call to her New Hampshire number, which is an AT&T resold customer for local service. It may appear that NYNEX should not be involved at all. However, the current routing service for billing, CMDS, "routes" the message based on the first 6 digits of the "billed to" telephone number. Because AT&T's local customer-by-virtue-of-resale resides in a NYNEX exchange, the call will route to NYNEX. Therefore, CMDS currently sends the message to NYNEX rather than AT&T. This misrouting requires an industry solution and the parties have *indicated that a solution is being developed and will be implemented in the future. In the mean time, the message will be misrouted to NYNEX.*

The key difference identified between the proposed billing processes is that in the NYNEX process, NYNEX keeps the billing & collection money when, in fact, AT&T is doing the billing & collection. This clearly is a mismatch and is unacceptable. NYNEX agreed to modify their process to correct this mismatch.

AT&T's process seems to be missing a step when compared to the NYNEX process. The missing step is the billing of AT&T by NYNEX for the rated message CMDS sent to NYNEX. In the actual process, CMDS debits the receiving party, NYNEX, with the amount of the message and credits NYNEX only when the net amount is remitted. NYNEX needs to bill AT&T for this as is shown in the NYNEX process. In step #3 of both parties' processes, there is a "record transmission fee" that NYNEX charges to AT&T. Record transmission fees occur in other steps, but were not relevant to the issue being arbitrated. AT&T can not currently have its message sent directly to it or its designated receiver. The network solution being worked on will address this problem of misrouting. When the network solution is operational, there should be no record transmission fee since the record will be transmitted to the correct carrier in the first place. In order to provide a continuing reason to address this misrouting problem, it would seem reasonable that AT&T should not have to pay NYNEX the record transmission fee in this specific situation until such time as the solution is actually in place.

AWARD

In the first scenario, a caller originates an in-region local call from an AT&T local-customer-by-virtue-of-resale that is served in a NYNEX exchange and bills it to the terminating number which is a local customer of NYNEX, the NYNEX's process is awarded. In the second scenario, a caller originates an in-region local call from a NYNEX local customer and bills it to the terminating number which is an AT&T local-customer-by-virtue-of-

resale that is served in a NYNEX exchange, the NYNEX process is awarded. In the third scenario, a caller originates an in-region local call from an AT&T local-customer-by-virtue-of-resale that is served in a NYNEX exchange and bills it to a terminating number in another region, the NYNEX process is awarded. In the fourth scenario, a caller originates an out-of-region local call and bills it to an in- region AT&T local customer by virtue of resale that is served in a NYNEX exchange, the AT&T approach is awarded with the addition of step #4 from the NYNEX process that indicates NYNEX will bill AT&T monthly for the entire rated message. In order to make sure that a solution to the misrouting problem is found and implemented quickly, it is also awarded that, for this specific type of call, the record transmission fee in step #3 shall not be charged by NYNEX to AT&T, until such time as the national solution is successfully operational.

2. Decision

We adopt the final award of the New Hampshire Arbitrator.

G. Issue 7 - Bona Fide Request (BFR) Process - Unbundling

1. Award of the New Hampshire Arbitrator

Issue:

This issue presents a disagreement regarding some components of the Bona Fide Request (BFR) process for use by AT&T to request unbundled network elements from NYNEX. The BFR process includes a request from AT&T, a Preliminary Report from NYNEX, and a Detailed Report from NYNEX which is a full statement of at least the feasibility, availability, and costs of associated with AT&T's request. The components in dispute include: the length of time for NYNEX to complete the Preliminary Report (component #1); the length of time for NYNEX to complete the Detailed Report (component #1); the charges or fee paid to NYNEX for completing the BFR process (component #2); and an additional step proposed by NYNEX for confirmation of the request (component #3).

Parties' Positions:

NYNEX indicated that section 156 of the First Report and Section 251(c) of the Act does not require NYNEX to use a BFR process in this situation. Nonetheless, NYNEX has agreed to use a BFR process but disputes several of the components of the proposed process.

Component #1: It appears by the comments filed by AT&T and NYNEX that the issue has been partially resolved. Both AT&T and NYNEX have essentially agreed by virtue of the time line filed in their comments that the first 30 days of each proposed BFR processes are essentially the same. The only difference being that the NYNEX time line indicates that the dates are "no later than," thus indicating that, if possible, the indicated process will be completed in a shorter period of time.

The remaining issue involves the length of time for NYNEX to complete the Detailed Report once it has been requested by AT&T. NYNEX states that this Detailed Report process should be no more than 90 days while AT&T contends that this process should take 35 days. NYNEX indicated that the reason for this longer period of time is that some of the requests may be complex and require detailed information from non-NYNEX sources, e.g., equipment vendors. AT&T contends that the process should not take this long.

Component #2: The pricing plan for the BFR process is an issue in dispute. NYNEX proposes that there be no charge for the preliminary report but that NYNEX should be reimbursed for its actual costs for completing the Detailed Report. AT&T would rather that a flat application fee be determined for the BFR process.

Component #3: The NYNEX BFR process includes an additional step after this Detailed Report process where AT&T must either confirm its order or seek arbitration within 30 days. If the 30 day period expires, then AT&T would have to start the entire process over again. AT&T contends that more time might be needed to *fully evaluate the practicality of actually deploying the requested element before confirming the order.*

Arbitrator's Analysis:

Component #1 As stated above, the time lines of both AT&T and NYNEX are essentially the same up through the preparation of the Preliminary Report by NYNEX. The time involved to produce the Detailed Report is at issue. Neither NYNEX or AT&T seemed to be able to quantify all of the probable scenarios and the length of time to produce a Detailed Report. This appears to be due both to the fact that the process is new and that it is difficult to predict such things as the type/complexity of each BFR, the number of simultaneous BFRs. Therefore, it seems that the effort required to accurately and fully complete the Detailed Report is difficult to estimate, as is a date certain for its completion. Because the NYNEX-proposed 90 day time limit is a no-later-than date, earlier completion is possible and reasonable in certain situations. There may also be a risk to NYNEX that if the tighter time limit is consistently missed, for legitimate reasons, NYNEX might be perceived as delaying the process. For these reasons the NYNEX proposal of no more than 90 days in which to complete the Detailed Report appears reasonable.

Component #2 NYNEX's pricing plan for the BFR process appears to be reasonable. Not charging for the Preliminary Report should encourage new entrants to look into developing innovative new services. In addition, by the nature of a Preliminary Report, the costs involved to produce it should be minimal. On the other hand, the preparation of a Detailed Report implies higher, and sometimes significantly higher, costs to produce. As stated earlier the inability to accurately forecast the types of BFRs would make it too difficult to develop a single BFR process charge. However, the requestor should have a fairly accurate idea on the anticipated charges and time involved for its specific BFR. NYNEX has agreed to include in the Preliminary Report an estimate on the time and the cost for the development of a Detailed Report. In addition, NYNEX has agreed to produce a separate, more detailed explanation of the cost estimate upon *request. The cost estimate put forward in the Preliminary Report will be payable at the time the request for the Detailed Report is made. There will be a true up at the end of the process, which is either at the completion date or the date NYNEX is notified by the requesting company to cancel the Detailed Report. In order to protect the requesting company from incurring unexpected, high true up costs, an upper limit of 20% on the margin of error is appropriate.*

Requesting a Detailed Report should indicate that the requestor is very seriously considering utilizing the requested network elements. Therefore, very few cancellations of requests for Detailed Reports are anticipated. Nonetheless, in order to protect NYNEX from expending resources that will not produce a Detailed Report, a lower limit for refund of the cost estimate amount by NYNEX is appropriate. The lower limit is -20%.

Component #3 While the idea underlying NYNEX's proposed requirement for a response within a certain length of time after the Detailed Report is completed is reasonable and comports with general industry practices regarding responses to Request For Proposals, the length of time proposed is too short. The 30 day time limit does not comport with general industry practices. A 90 to 120 day expiration date is more in keeping with general industry practice. The low end of this time limit, 90 days, appears more reasonable. AT&T certainly has the right to respond to NYNEX in less than 90 days.

Award:

Component #1 The "no later than" time frame, as proposed by NYNEX for the maximum time for completion of the Preliminary Report is awarded. The 90 day time line, as proposed by NYNEX for the maximum time for completion of the Detailed Report, is awarded.

Component #2 The pricing arrangement for the Preliminary and the Detailed Reports outlined above was agreed to by NYNEX and AT&T, incorporating the inclusion in the Preliminary Report of a *time and cost estimate for completion of the Detailed Report. NYNEX and AT&T also agree upon the provision of a more detailed explanation of the time and cost estimate upon request. Therefore, those parts of the pricing arrangement are not subject to award. The true-up at the end of the process is subject to award: as discussed above, AT&T shall have the protection of a +20% limitation on the margin of error; NYNEX shall have the protection of a lower limit of -20% on the refund of the cost estimate amount.*

Component #3 The BFR process shall include the additional step as outlined by NYNEX but the period shall be extended to a 90 day period in which AT&T must confirm its intent to deploy.

2. <u>Decision</u>

We adopt the final award of the New Hampshire Arbitrator.

H. Issue 8 - Advance Notification of Tariff Structure Changes

1. <u>Award of the New Hampshire Arbitrator</u>

Issues

AT&T requests that the 30 day notice requirement on NYNEX for tariff structure changes, currently required by commission rules, be codified in the interconnection agreement.

Parties Positions:

There is no filed disagreement concerning the length of the commission mandated 30 day notice period regarding structural changes to NYNEX tariffs involving retail services that are now subject to resale by AT&T. However, AT&T wants to put the current 30 day notice requirement in the interconnection agreement because of potential changes in commission rules due to future legislative activity.

AT&T references paragraph 518 of the First Report to support the importance of electronic interfaces for Operational Support Systems (OSS). NYNEX counters that paragraph 518 only refers to the interface with incumbent LEC's OSS in for the purpose of accessing current information, not future tariff changes.

NYNEX asserts that the current 30 day requirement of the commission is still in place so no further action is required, since both parties agree with the current 30 day time period.

While AT&T was willing to sign a non-disclosure agreement with NYNEX, NYNEX was concerned that a non-disclosure agreement may not be easily enforceable, especially if dealing with less than scrupulous individuals. This characterization did not apply to AT&T, but because of the Most Favored Nation clause, any paragraph in this contract may be available to anyone.

Arbitrator's Analysis:

The only issue subject for arbitration is whether the 30 day advance notification should be as a result of commission rules or awarded. Although Paragraph 518 of the First Report, when read alone, may be interpreted as applying to future changes, when read in conjunction with Paragraph 519 it appears that Paragraph 518 also is referring to on-line/real-time access. Paragraph 519 refers to the experiences with Rochester Telephone's lack of on-line systems and also refers to NYNEX's provision of real-time electronic access to its systems. Therefore, Paragraph 518 is referring to on-line, real-time access.

It is interesting to note that AT&T has argued in the past, in its quest for non-dominant status as an interexchange carrier, that it was competitively disadvantaged by having to file tariffs for changes in both existing service and new service with the FCC for approval because its competitors received advance notice of its service offerings. Now, when the roles are reversed as in this case, AT&T insists on the importance of advance notification. It is true that AT&T is a facilities based interexchange carrier but, to the extent that AT&T sold any of *its previously tariffed service to resellers, they probably experienced the same problems that AT&T now sees.*

On the other hand, a 30 day notice may be reasonable because of the symbiotic relationship between the reseller and the resellee. AT&T expressed difficulty in getting tariff changes in a timely manner even today because they do not have regulatory personnel in Concord. This difficulty in getting tariff changes in a timely manner may have to be factored into any personnel cost savings decisions considered by AT&T.

Arbitrator's Award:

The current situation where NYNEX is required to provide advance notice to the commission per the commission's rules is awarded. It is also awarded that the commission should post NYNEX tariff submission, either as a status report or the full tariff filing on its WEB page, if possible, in order to provide better notice.

2. Decision

We do not adopt the final award of the New Hampshire Arbitrator. We believe that AT&T has a need, for planning and marketing purposes, to be provided 30 days notice of structural changes to tariffs (changes to terms and conditions rather than to rates) that is independent of the statutory 30-day notice requirement in 35-A M.R.S.A. § 307.[1]

I. Issue 22(a) - Discounts for Resold Services - Identification of Avoided Costs

[1] The requirement at issue is for a minimum amount of notice to providers. It does not address the speed of the approval process by this Commission for structural tariff changes. Nevertheless, in a competitive market we need to address the latter issue to ensure that the rules now embedded in regulation do not unreasonably impede any provider's ability to compete effectively.

1. Award of the New Hampshire Arbitrator

Issue: Identification of the specific avoided costs to be included in the discounts for resold services.

Parties Positions:

The positions of the parties will be indicated in the arbitrator's analysis and award below.

Arbitrator's Analysis

Wholesale discount factor - the New Hampshire method and potential problems

Basic Methodology

This wholesale discount factor(s) is to be applied to rates of NYNEX resellable services which are defined as those NYNEX services that are currently offered to NYNEX end users. Application of this factor(s) to these NYNEX retail rates will calculate the discount between the retail rate charged by NYNEX to its retail customers and the wholesale rate that will be charged by NYNEX to AT&T when AT&T resells these NYNEX services.

Conceptually there are 8 steps in the calculation of this discount factor. While a specific methodology was not found in New Hampshire, dividing this process into steps may make the discussion more understandable. These conceptual steps are:

1. Categorization of expenses between the three FCC determined categories

2. Calculation of the "costs"/revenues of all services available for resale

3. Potential adjustment of the expenses to include only those adjustments included in the rates of the resellable services

4. Calculation of the avoided and not avoided expenses for the "direct" expenses, both presumptively avoided and presumptively not avoided

5. Calculating the "indirect" factor to be used on the presumptively avoided - indirect expenses

6. Application of the "indirect" factor to the presumptively avoided - indirect expenses

7. Calculation of the overall wholesale discount factor

8. Redistribution of wholesale discount factor between business and residence resellable services

Step #1 - Categorization of expenses between the three FCC determined categories.

The FCC determined that there would be three categories of expenses relating to all of the expenses of resellable services. The first category consists of those expenses that are presumptively avoided and are to be directly assigned between actually avoided and actually not avoided. The presumption is that these are avoided, so it would be expected that most, if not all of these expenses would be actually avoided. Per the FCC rules, NYNEX bears the burden of proving to the satisfaction of the state commission if any of these expenses are not avoided. While the FCC did not specify subcategories, it appears that within this category, there are two distinct subcategories. The first subcategory consists of those expenses that are presumptively avoided by virtue of NYNEX moving from a retail structure to a wholesale structure. Produce management, sales, and product advertising expenses are examples per 51.609(c)(1). The second subcategory consists of those expenses that are presumptively avoided by virtue of these expenses being included in a resellable service's rate and provided either by NYNEX under a separate NYNEX contract or provided by another company other than NYNEX. Operator services is the example in the FCC 1st Report and Order. The FCC indicated that resellers indicated a *desire that operator services be provided either by a contract with NYNEX or by some other provider, e.g. the reseller or another provider. The second subcategory consists of the expenses of that portion of the resellable services that are provided by other means other than the wholesale rate. As stated above per 51.609(c)(1), call completion and number services expenses fit this description.*

The second category consists of those expenses that are presumptively not avoided and are to be directly assigned between actually not avoided and actually avoided. The presumption is that these are not avoided. These expenses consist of plant-specific expenses and plant non-specific expenses other than general support expenses [51.609(c)(3)].

The third category, per paragraph 918, consists of those expenses that are tied to the overall level of operations in which an incumbent LEC engages and are presumptively avoided in proportion to the ratio of directly assigned actually avoided expenses, both presumptively avoided and presumptively not avoided, to total directly assigned expenses, both presumptively avoided and presumptively not avoided. Per 51.609(c)(2), examples of these expenses are general support, corporate operations and uncollectible expenses.

Step #2 Calculation of the "costs"/revenues of all services available for resale

This number will be the denominator in the calculation of the overall discount factor. While it may be more technically correct to use the costs associated with resellable services, this may entail extensive cost allocations and use of the revenues of resellable services may be a simpler but still results in a reasonable surrogate. Another way to think about this number, resellable revenues, is that it is equal to total revenues (Part 32) less the revenues of non-regulated (Part 64), less SNFA revenues and less the revenues of non-resellable services, such as access. This is an important calculation because the services' expenses in the numerator should be for the *same services as the services' revenues in the denominator.*

Step #3 Potential adjustment of the expenses to include only those adjustments included as the basis for the rates of the resellable services

This potential adjustment depends on exactly what services are included in the first pass at the expenses. For example, if total services are used, then non-regulated service, SNFA services, interstate access and intrastate access services, and perhaps some miscellaneous services'expenses and revenues may need to be deducted from the total amounts in the accounts outlined 51.609. The key is that only the expenses for those services that are available for resale are included in the calculation of the wholesale discount factor. If this is not done there may be a mismatch, which is discussed at length below.

Step #4 Calculation of the avoided and not avoided expenses for the "direct" expenses, both presumptively avoided and presumptively not avoided

This step requires an account by account analysis of whether a presumptively avoidable direct expenses is not avoided and whether a presumptively not avoidable direct expense is avoided.

Step #5 Calculating the factor to be used on the presumptively avoided - indirect expenses

The objectives of this factor is to allocate the expenses categorized as indirect expenses between avoided and not avoided in proportion to the ratio of presumptively avoided and presumptively not avoided actually avoided expenses to total presumptively avoided and presumptively not avoided expenses. The key word is proportion.

The factor is calculated by dividing the sum of the actually avoided expenses of the presumptively avoided direct expenses (category 1) and the actually avoided expenses of the presumptively not avoided direct expense (category) by the sum of *both the actually avoided and actually not avoided expenses of the presumptively avoided direct expenses (category 1) and both the actually avoided and actually not avoided expenses of the presumptively not avoided direct expenses (category 2). All of these expenses are for only those services that are resellable.*

Step #6 Application of the "indirect" factor to the presumptively avoided - indirect expenses

While this may appear as a simple arithmetic function, from a mathematics standpoint, it is conceptually important to make sure that this factor is applied to all and only the indirect expenses. If some of these presumptively avoided indirect expenses are directly assigned, then additional steps may need to be taken and previous steps recalculated.

Step #7 Calculation of the wholesale discount factor

This step is really an arithmetic operation of adding together all of the actually avoided expenses (presumptively avoided direct, presumptively not avoided direct and presumptively avoided indirect), i.e., categories 1, 2, and 3.

Step #8 Redistribution of wholesale discount factor between business and residence resellable services

This step may be done based on a combination of lines, minutes, etc.

Which number to use? - The "units" problem

What became known during the meetings as the "units" problem developed into something more. This issue was triggered by the unexplained relationship between the numerator and denominator of the wholesale discount factor as originally presented by both AT&T and NYNEX.

As stated earlier, the wholesale discount factor has a numerator consisting of the amount of the total actually avoided *expenses of resellable services and a denominator of total costs or revenues of resellable services. The issue revolved around the numerator. The denominator was relatively easy to calculate - resellable revenues, which in the case on New Hampshire is almost all, if not all, intrastate revenues, since New Hampshire is a single LATA state and therefore NYNEX has very few, if any, intrastate interLATA access services. As stated above, this number could also be calculated by subtracting non-regulated revenues (part 64) and SNFA revenues and revenues from non-resellable services (interstate access, including billing and collection) from total revenues. For new Hampshire, a single LATA state, this equates to intrastate revenues. Both NYNEX and AT&T calculated this in approximately the same way. The numerator was another story.*

*AT&T calculated the numerator by starting with total regulated expenses (ARMIS 43.03) and subtracting the <u>incremental</u> costs of interstate access and other miscellaneous services. According to AT&T this difference is the "real" expenses associated with resellable services. These incremental presumptively avoided direct expenses associated with non-resellable services (interstate access and some miscellaneous services) was approximately 0.2% of the embedded amount associated with these specific expenses of interstate access. As might be expected, the resulting numerator looked much larger than the separated intrastate amount per Part 36 for these same expenses. For example, according to AT&T, the incremental amount for customer services (account 6623) for the non-resellable services would be approximately 0.2% of total regulated amount ($30,763,000 * .002 = $61,526), which would then leave 99.8% of the total regulated amount ($30,763,000 * .998 = $30,701,474) for the resellable services. As stated earlier, New Hampshire is a single LATA state and the resellable services are very close to the intrastate services and therefore the intrastate costs. Per the ARMIS 43.04, the intrastate amount for Other Customer Services is $24,201,000. By only subtracting incremental expenses for the non-resellable services from the numerator while subtracting full revenues for the non-resellable services from the denominator insured a relatively high wholesale discount* *factor. In fact when it was pointed out to AT&T that this factor could theoretically be above 100%, AT&T indicated that this would be reasonable since clearly, per AT&T, interstate access is being subsidized and without this kind of calculation NYNEX would retain windfall profits.*

Example 1

*AT&T demonstrated these windfall profits in the following example. Assume local service is the only resellable service, the local rate is $10/month, there is a $2/month "subsidy" included in the current interstate access rates and there is $1/month of avoided local costs. One method of calculating the discount rate would be to take the $1/month of avoided local costs and divide it by the resellable revenues of $10/month, thus calculating a wholesale discount factor of 10%. The resale rate for local service would be $9/month ($10/month - ($10/month * 10%)). Since NYNEX would still retain the $2/month subsidy in interstate access rates, NYNEX would have $11 of revenue. This would amount to windfall profits, per AT&T since the costs underlying the $2/month subsidy would also disappear.*

Example 2

*According to AT&T the more correct method would be to calculate the wholesale discount rate by adding the $1/month avoided costs and the $2/month subsidy in current interstate access rates together ($3/month) and calculate a proper wholesale discount of 30% ($3/$10). Applying this 30% factor to the $10/month local rate would make a resell local rate of $7/month ($10/month - ($10/month * 30%)). NYNEX would not have windfall profits since the total revenues from resale ($7) and interstate access subsidy ($2) would be only $9/month.*

Example 3

*In addition, according to AT&T, if the $2/month interstate subsidy were properly placed in local rates in the first place, thus raising the local rate to $12/month. This even more correct method would calculate the wholesale discount rate by adding the $1/month avoided costs and the $2/month subsidy formerly in interstate access rates but now properly in local together ($3/month) and calculate an even more proper wholesale discount of 25% ($3/$12). Applying this 25% factor to the more proper $12/month local rate would make a resell local rate of $9/month ($12/month - ($12/month * 25%)). NYNEX would not have windfall profits since the total revenues from resale ($9) and interstate access subsidy ($0) would be only $9/month.*

It is interesting to understand the assumptions underlying these three examples. In the first example, AT&T assumes that there is a subsidy in interstate access rates and that this subsidy is directly linked to the $1/month of avoided costs in local rates. In the second example, AT&T assumes that the alleged interstate subsidy properly belongs in the state jurisdiction and more precisely in the local rates, which are subject to resale. AT&T suggests that the $2/month allocated interstate expense be used in the calculation of the avoided costs associated with intrastate resale rates. What this means is that despite the fact that current federal rules (Part 36) allocate this $2/month to the interstate jurisdiction, a state regulator is to offset intrastate revenues by this uneconomic, but legal "misallocation". To the extent that there may be an intrastate shortfall, AT&T responded that this "alleged `shortfall' is an artifact of jurisdictional accounting only. It is not a true shortfall." It is difficult to understand how AT&T can maintain this argument in the face of a jurisdictional cost allocation process that has its own set of federal rules, has existed for decades and most importantly, these federal rules have not been changed one iota by the FCC (or a joint board) as a result of the interconnection portion (section 251/252) of the 1996 Telecommunications Act. In the third example, AT&T clearly insists that local rates need to be increased by the assumed

$2/month interstate subsidy. As AT&T is no doubt aware, the New Hampshire Commission found that local rates were not being cross subsidized. However, if AT&T wants to insist that the current rates are being cross subsidized, then they need to make a formal petition to the New Hampshire Commission or to the FCC. Since AT&T has not yet done so, and since AT&T can not unilaterally raise NYNEX's local rates, it is difficult to take this example very seriously.

In addition, a major problem with all three of these AT&T scenarios is the unproven assumption that all of the alleged interstate subsidy is 100% local. If there is a subsidy, it could be in other areas. For example, in the FCC's Open Video Systems cost allocation docket (CC96-112), it was acknowledged that currently virtually no Cable and Wire Facilities investment is allocated to non-regulated by most LEC's implementation of Part 64 rules, even though in the case of Open Video Systems a significant portion of Cable & Wire Facilities investment in a joint voice-video system may indeed be utilized by the non-regulated Open Video Systems. To the extent that construction has commenced, a portion of these "joint"video-voice costs may be included in interstate access rates. If this is part of the subsidy that AT&T is talking about, it is not caused by local.

There are other problems. While the arithmetic of the AT&T method may be interesting, it is the underlying assumptions of AT&T that is flawed when applied to how today's world operates. The practical effect given the current rules of what AT&T wants to do is to have the non-incremental portion of interstate access paid for by NYNEX customers of NYNEX resellable services.

NYNEX is rate-of-return regulated in New Hampshire. In the second example, if AT&T's methodology is used, assuming the wholesale discount rate would be 30% and assuming a local rate of $10/month, the wholesale local rate would be $7/month. As stated above $2/month of this discount is <u>interstate</u> not intrastate, but AT&T wants the state to make up the shortfall. The shortfall occurs because even AT&T admits that the underlying intrastate costs of the wholesale local rate would be $9/month but the *wholesale intrastate revenues would be only $7/month. Since NYNEX is rate of return regulated, rates for other intrastate NYNEX services may need to be raised to cover the shortfall caused by this methodology. AT&T responds that if this shortfall happens, it will be made up by the Universal Service Fund (USF) being contemplated by the FCC. Regardless of whether this <u>will</u> happen in the future, under current interstate USF rules it will not happen. Apparently the interstate USF rules will not be rewritten by the FCC until the June, 1997 time frame. By the way, if the FCC intends to make up this kind of shortfall, it might be wise to indicate this to the states since at this point, this does not appear to be the direction the FCC is taking.*

This aside, it appears that AT&T wants NYNEX retail customers of NYNEX resellable services to subsidize AT&T's retail customer via resale of NYNEX services. This appears to be a violation of section 254(k) that indicates that a telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. While the Act does seem to indicate that subsidization may be appropriate in certain specific instances, e.g., universal services, averaging of rural rates to non-rural rates and services to hospitals, schools and libraries, this particular situation does not seem to meet these criteria.

Fix #1

Given this, the next issue is how to fix this problem so that there is a match between the revenues actually associated with resellable services and the expenses actually associated with resellable services. NYNEX ARMIS information has been used in these calculations because it is publicly available and is certified by an officer of NYNEX.

One thought is to use subject to separations - intrastate numbers in both the numerator and the denominator. AT&T argued that separations results are arbitrary and non-cost based and therefore should not be used. It was noted that AT&T had used "Total Regulated" amounts from the ARMIS 43.03 which is derived *after the allocation of expenses to non-regulated per Part 64. Since Part 64 is not an incremental cost allocation methodology, it seemed inconsistent that the Part 64 non-cost based allocation was apparently acceptable, but separations (Part 36) was not. In addition, the incremental factor (0.2%) used by AT&T was based on a Bell Atlantic - Pennsylvania "study". How a study based on Pennsylvania data was relevant at all to New Hampshire was explained by AT&T with the statement that NYNEX had not done a study for New Hampshire. Thus not only is the methodology employed by AT&T appear to be inconsistent, the application of the methodology appears to be not completely logical and/or not yet fully developed. Regardless of the application of methodology, the methodology itself causes significant problems.*

Therefore the subject to separations - intrastate numbers per ARMIS 43.04, adjusted for non-resellable intrastate services' expenses (numerator) and non-resellable intrastate services' revenues (denominator) are used in New Hampshire. Since New Hampshire is a single LATA state, adjustments are expected to be minor. This really is applying the example #1 above. To the extent there is any interstate "windfall", this is an interstate problem and the FCC should be more than capable of handling the situation. This is not in the jurisdiction of the New Hampshire PUC. While this may not be the ideal solution, it certainly does not fall into the traps of the examples (#2 and #3) presented by AT&T where either a blatant cross subsidization by NYNEX customers (#2) or an across the board local rate increase (#3) is required.

Problem #2

Per 51.609(d) there is reference that costs can be concerned as not avoided if specific costs are not included are not included in the retail prices of resold services. Furthermore the FCC states in paragraph 911 "`the portion [of the retail rate]...attributable to costs that will be avoided' includes all of the costs that the LEC incurs in maintaining a retail, as opposed to a wholesale, business. In other words, the avoided costs are those that an incumbent LEC would no longer incur if ir *were to cease retail operations and instead provide all of its services through resellers". Later in the same paragraph the FCC interprets the Act "as requiring states to make an objective assessment of what costs are reasonably avoidable when a LEC sells its services wholesale." If an objective assessment is to be made, it must include the actual effect that will occur rather than just a theoretical view. Therefore the existing systems that in operation today, e.g., part 32, part 64, and part 36, must be considered in order to complete this objective assessment. If these systems are not taken into account, then a theoretical assessment is made, not an objective assessment.*

A real separations (part 36) problem - how the real world works today.

Intrastate marketing expense per the 43.04 is $13,979,000 out of a total subject to separations amount of $20,894,000 for an intrastate allocation factor of approximately 66.9%. The interstate allocation factor would be 33.1%, which means that $6,916,000 is allocated to the interstate jurisdiction. If none of the $13,979,000 of intrastate marketing expense were to be presumptively not avoided, then all $13,979,000 would be avoided. The problem stems from the fact that not all NYNEX services are wholesale and therefore the expenses treated as avoidable for the resellable services would not be avoidable for the non-resellable services. Therefore the $6,916,000 interstate marketing expense is not avoided since interstate access is not a resellable service. This could cause a problem with separations since the allocation factor of marketing expense is revenues, the allocation factor would not reasonably be expected to change too much. (The marketing expense allocation factor may actually be higher interstate because the resold local services generate less revenue.) Therefore if all but $6,916,000 of marketing is not avoided (the old interstate amount), 66.9% of the now total subject to separations amount of $6,916,000 ($4,626,804) would still be allocated to the intrastate jurisdiction and only 33.1% ($2,289,196) would be allocated to the interstate jurisdiction despite the fact that all $6,916,000 of the marketing expenses was generated solely by the non-resellable interstate access *service.*

The state rates now reflect an expected intrastate expense reduction of $13,979,000, but instead of actually realizing the full amount, only $9,352,196 is actually avoided because $4,626,804 is still allocated to the state jurisdiction. As seen above, this could cause a potential intrastate revenue shortfall of $4,626,804, thus causing a potential rate increase for NYNEX customers of NYNEX intrastate services, and once again raising a cross subsidy issue. While in the interstate jurisdiction, there is a equal reduction in interstate expenses of $4,626,804. If NYNEX had selected the highest productivity factor, then potentially none of this reduction in interstate expenses would be reflected in a reduction of interstate rates. If this is the case in the interstate jurisdiction, it may be of interest to the FCC, but is of little direct interest for the New Hampshire commission.

AT&T dismissed and/or minimized this problem by saying that no marketing costs should be allocated to interstate and therefore if any marketing costs are allocated to interstate, it is inappropriate but more importantly, whatever shortfall this might cause in intrastate is made up for in the interstate. Once again AT&T insisted that "this `shortfall' on intrastate services is only an accounting shortfall that is offset exactly by a windfall on interstate access". As stated above, there are still two regulators - one federal and one state, unlike the world that AT&T seems to believe exists, these two worlds, while related, do not yet cross over to claim revenues from the other jurisdiction.

This same problem exists with other presumptively avoided - direct expenses, e.g., customer operation (6723) as well as those expenses that are presumptively avoided - indirect, e.g., corporate operations - general and administration expenses (6720) and general support expenses (6120). The arithmetic becomes a little more complex, but the logic remains the same. Since account 6120 will also drag with it other General Support investment related expenses, e.g.,. return and taxes, the *arithmetic now becomes even more complex but again the logic remains the same. AT&T has yet to make a representation as to how much of the allocated interstate costs for these expenses are "truly" avoided. Neither has AT&T indicated how much of the allocated interstate costs associated with operator services including the investment portion are "truly" avoided. It would appear that these do not fit into the same "true" cost allocation category as marketing.*

Fix #2

One way to mitigate this allocation problem would be through direct assignment. Under direct assignment, returning to the "marketing" case, all $6,916,000 would be directly allocated to the interstate jurisdiction and $0 would end up in the state jurisdiction. Direct assignment was prohibited as a general philosophy in the FCC's "Letter of Interpretation" dated 08/21/91 (including associated petitions for waiver and Memorandum Opinion and Order). Since direct assignment is not available, the only way for NYNEX to actually avoid $13,979,000 in the intrastate jurisdiction would be to actually cut all $20,894,000 of marketing expense, which is not reasonable since not all NYNEX services are wholesale services and therefore would not have any reduction in these "retail" expenses. It must be noted that if the expense that is reduced is 100% allocated to state, as is the case in local service order processing, this would not be much of a problem. This is the only large expense of this type that readily comes to mind.

As stated above, this jurisdictional mismatch is potentially large. These Part 36 rules are not new nor have they been recently modified as a result of the Act nor has the FCC indicated at the time of their First Report and Order that they are intending to modify this process. Therefore if can be assumed that this process is still in place and is intended to continue working as it is and has been. While it might be argued that this mismatch is all caused by an entirely too complex and little understood process known as separations (Part 36), it must be noted that the wholesale discount study, TELRIC studies, and *the Hatfield Model (as well as other models such as the Benchmark Costing Model) are certainly much more complex and even less understood. If half as much time that has been spent and will be spent understanding these new processes were to be spent on understanding the existing separations process, there would not be these mismatches and/or they would be solved quickly.*

Arbitrator's Award

There are two categories of awards for this issue.

Award Category #1

As discussed above and for the reasons stated above, the initial arbitrator's award is the use of subject to separations - intrastate from the 1995 ARMIS 43.04 for NENH.

Award Category #2

The specific awards for the individual accounts/subaccounts are as follows:

Awards for Wholesale Discount Rate

Presumptively Avoided - Direct

6611 - Product Management

NYNEX offered a study by Cambridge Strategic Management Group that stated in an all wholesale environment, NYNEX would continue 100% or more of its current spending on product management (6611) and advertising (6613). AT&T stated that this account should be 100% avoided.

DECISION - 10% of this account will be retained in a resale environment in order to maintain the AT&T account with NYNEX; 90% will be avoided..

6612 - Sales

NYNEX generally concurs that the majority of the expense is avoided (98.66%), excluding E911. AT&T stated that this account should be 100% avoided.

DECISION - All of this account is avoided, with the exception of E911. Therefore 98.66% of this account will be avoided.

6613 - Advertising

NYNEX offered a study by Cambridge Strategic Management Group that stated in an all wholesale environment, NYNEX would continue 100% or more of its current spending on product management (6611) and advertising (6613). AT&T stated that this account should be 100% avoided.

DECISION - All of this account is avoided.

6621 - Call Completion
6622 - Number Services

NYNEX initially maintained that it intended to offer operator services to all resellers, but later offered a study that indicated what the avoided discount rate would be if the reseller provided the operator services. It appeared that regardless of which NYNEX study, there were no reductions in either 6621 or 6622. AT&T offered that this account should be 100% avoided since AT&T evidently intended to either provide these services themselves and/or contract with another provider. After discussion, it was decided that a "net avoided" analysis would be used where the revenues associated with operator services would be netted against the entire costs of providing operator services. This would include more that the 6621 and 6622 accounts.

DECISION - Two sets of ratios will be calculated. One with operator services provided by NYNEX and therefore not avoided and another with operator services provided by AT&T and therefore avoided. In the latter case, the "net avoided" analysis *discussed above will be used.*

6623 - Customer Services

NYNEX offered detailed accounting cost analysis of which sub "functions" will be avoided and not avoided.

6623.1 - Customer Accounting

NYNEX offered that most of these expenses would be avoided (84.59%). AT&T offered that this account would be 100% avoided.

DECISION - NYNEX's detailed analysis is reasonable and therefore 84.59% will be avoided.

6623.2 - Service Order Operations

NYNEX offered that most of these expenses would be avoided (86.03%). AT&T offered that this account would be 100% avoided.

DECISION - NYNEX's detailed analysis is reasonable and therefore 86.03% will be avoided.

6623.3 - Coin

DECISION - As a result of the recent FCC pay phone order, this account will be removed in its entirety. All pay phone costs that has been declared as deregulated must be removed. This will affect many accounts.

6623.4 - Instruction

Both NYNEX and AT&T agree that 100 % of these expenses should be avoided.

DECISION - 100% of these expense will be avoided.

6623.5 - Message Investigation

NYNEX offered that none of these expenses will be avoided since they will still have to do these investigations. AT&T it will do these investigations and therefore stated that 100% of these expenses should be avoided.

DECISION - Based on the information at hand, NYNEX will still be doing these investigations for AT&T and therefore none of these expense will be avoided.

6623.7 - Non Pub Commissions

Both NYNEX and AT&T agree that 100 % of these expenses should be avoided.

DECISION - 100% of these expense will be avoided.

6533/6533.21 Testing

Per NYNEX records, 6533.21 amounts to approximately 19.87% of total 6533 account and will be avoided. AT&T offered that 20% of account 6533 will be avoided. Discussions were held in order to attempt to determine exactly which functions would be done be AT&T and which functions would remain with NYNEX.

DECISION - NYNEX's detailed analysis is reasonable and therefore 19.87% will be avoided. NOTE: This account moved from an indirect account to a direct account. As a result, 80.13% will not be avoided.

6534 - Plant Operations

AT&T argued that this account is directly related to 6533 Testing and therefore it should be allocated in the same proportion. NYNEX responded that this account applies to the entire plant operations, not just testing.

DECISION - Since the portion attributable to testing was small, NYNEX's explanation appears reasonable and none will be considered as avoidable.

INDIRECTS

6711 - Executive

NYNEX argued that this account is a fixed common cost and will not vary with the move to a wholesale environment. NYNEX also maintained that even if there is a change in revenue level, there will not be a reduction in this fixed common cost. AT&T argued that this account should be treated as a true indirect expense.

DECISION - AT&T's analysis is more reasonable and therefore this account is an indirect expense.

6712 - Planning

NYNEX argued that this account is a fixed common cost and will not vary with the move to a wholesale environment. NYNEX also maintained that even if there is a change in revenue level, there will not be a reduction in this fixed common cost. AT&T argued that this account should be treated as a true indirect expense.

DECISION - AT&T's analysis is more reasonable and therefore this account is an indirect expense.

6721 - Accounting Operations
6721.1 - General Accounting

NYNEX represented that this subaccount deals with the preparation of financial reports and since these financial reports will continue to be required, 38.4% of the entire 6721 account will not be avoided. The rest of the expenses in this account will be treated as an indirect expense. AT&T argued that this account should be treated as a 100% indirect expense.

DECISION - This account will be treated as an indirect expense with 38.4% as directly not avoided and the rest as an indirect expense.

6722 - External Relations

DECISION - This account will be treated as an indirect expense with the exceptions listed below, These exceptions cause 6.5% of this account to be directly not avoided.

6722.4 Connecting Company Relations

NYNEX represented that this subaccount will not be avoided because NYNEX must continue to deal with the independent telephone companies just as today. AT&T argued that this subaccount should be treated as an indirect expense.

DECISION - NYNEX's analysis appears reasonable. Therefore this subaccount will be not be avoided.

6722.5 Government Relations

NYNEX represented that this subaccount will not be avoided because NYNEX must continue to deal with the government/regulators in much the same way as today. AT&T argued that this subaccount should be treated as an indirect expense.

DECISION - AT&T's analysis appears to be reasonable since at least some of the regulatory burden should be shifting to the competitive entrant and/or the regulatory burden may decline as a result of competition. Therefore this subaccount will be treated as an indirect expense.

6723 - Human Resources

Both NYNEX and AT&T agree that this account is an indirect expense.

DECISION - This account will be treated as an indirect expense.

6724 - Information Management

Both NYNEX and AT&T agree that this account is an indirect expense.

DECISION - This account will be treated as an indirect expense.

6725 - Legal

Both NYNEX and AT&T agree that this account is an indirect expense.

DECISION - This account will be treated as an indirect expense.

6726 - Procurement

Both NYNEX and AT&T agree that this account is an indirect expense.

DECISION - This account will be treated as an indirect expense.

6727 - Research and Development

NYNEX stated that none of the expenses in this account will be avoided in the new environment since these expenses have to do with research and development for non-market research, e.g., network. Expenses associated with the following groups are examples for this account: Bellcore and NYNEX's Science and Technology. AT&T argued that this account should be treated as a true indirect expense, especially since NYNEX did not show that this account was not applicable to other directly avoided expenses such as operator services and/or improved billing arrangements.

DECISION - AT&T's analysis appears reasonable and this account will be treated as an indirect expense.

6728 - Other General and Administration

DECISION - This account will be treated as an indirect expense with the following exceptions listed below:

6728.17 - Accidents Settlements

NYNEX initially argued that the level of accidents will not decline and therefore none of the expenses in this subaccount will be avoided. Upon further discussion, NYNEX indicated that 94% of this subaccount was paid in association with plant/network/operations and 6% was paid out to general operations. AT&T argued that this subaccount should be treated as a true indirect expense.

DECISION - NYNEX's analysis appears more reasonable. Therefore 94% will not be avoided and the remaining 6% will be treated as an indirect expense.

6728.9 - Other General and Administration

NYNEX argued that all of this subaccount will not be avoided since it is associated with the general costs of doing business. Upon further discussion, NYNEX noted that pension enhancements were a large portion of this subaccount (subaccount 6728.91 - Death Benefit Accruals=$23,000 out of the subaccount total of $33,000) with the remaining portion ($10,000) being other fees. NYNEX argued that these pension enhancements (primarily due to downsizing) are one time costs and furthermore no expenses in pension enhancements were included in the 1988 test year that was used as the basis for setting current rates in the last rate case, 89-110. AT&T observed that these costs are included in today's rates by virtue of NYNEX - New Hampshire having state earnings of 9.84% for the last 12 months ending June, 1996. Furthermore, NYNEX has yet to file a rate case in New Hampshire, which would be one expectation if these costs were not being recovered in existing rates. In addition NYNEX argued that the costs associated with NYNEX corporate costs (subaccount 6728.95) are not avoided. AT&T argued that this entire *subaccount should be treated as a true indirect expense since these expenses are indeed related to the overall operations of NYNEX - New Hampshire..*

DECISION - AT&T's analysis appears more reasonable and therefore this subaccount will be treated as an indirect expense.

5301 - Uncollectibles

NYNEX believed that none the current uncollectibles will be avoided while AT&T believed that all of the uncollectibles will be avoided by NYNEX in a pure wholesale environment. NYNEX countered that they will have to deal with other resellers who may not be as responsible as AT&T and thus there will indeed be uncollectibles. AT&T responded that since all resellers will be certified by the state PUC, this should not be a problem. NYNEX stated that the certification process was not extensive. After further discussions, AT&T indicated that they have experience with resellers and their true uncollectible rate for resellers is 0.6% of revenues. Per AT&T, this figure did not include those allowances that were written off because the reseller did not meet the contracted for level of operations. NYNEX indicated that these write offs should be included and if they were would cause the resulting uncollectible factor to exceed the existing 2.1%.

DECISION - The intent of this decision is to have 0.6% of revenues be directly assigned as not avoided and the remainder to be directly assigned as an avoided indirect expense.

There was no discussion concerning the other indirect expenses identified by the FCC.

Presumptively Not Avoided

Operator Services

AT&T suggested that since the actual operator services *expenses are avoided, so too should the actual operator investment and related expenses. NYNEX was not initially sure that this was completely appropriate, but after discussion agreed that there needed to be a symmetry between the "netting" of the costs of operator systems and the revenues. It was noted by NYNEX that the return should be grossed up for state taxes of approximately 6%.*

DECISION - AT&T's analysis appears reasonable. Therefore the related operator services expenses, e.g., depreciation, return and taxes will be allocated on same basis as the related operator investment.

General Support Facilities

As a result of account 6121 - Land and Buildings being treated as an indirect expense, AT&T argued that all of the related "GSF" expenses should also be included. NYNEX disagreed.

DECISION - AT&T's analysis appears reasonable. Therefore the related "GSF" expenses, e.g., depreciation, return and taxes will be allocated on the same basis as account 6121.

7240 - Other Operating Taxes, other than income taxes

NYNEX argued that only "non-plant" related taxes should be allocated other than those allocated to the avoided Operator Systems and GSF as noted above. This accounts for almost all of this account. After discussion, AT&T acknowledged this may be true, but since this is going to be such a small number, no allocation will be necessary.

DECISION - Property taxes associated with "common land and buildings" will be considered an avoided indirect expense. Property taxes associated with central office facilities and the like will be considered a not avoided expense, except to the extent that they are associated with operator systems. Other expenses associated with this account will be treated as an indirect expenses.

Account 6121 - Land and Buildings

DECISION - Expenses associated with "common land and buildings" will be considered avoided indirect expenses. Expenses associated with central office facilities and the like will be considered not avoided.

Account 6122, 6123. 6124 - Furniture and Artwork, Office Equipment, General Purpose Computers

DECISION - These accounts will be treated as indirect expenses.

Indirect Expense Allocation Factor

DECISION - The indirect expense allocation factor will be the avoided direct expense (numerator) divided by the total direct expenses, both avoided and not avoided (denominator).

2. Decision

AT&T argues that avoided costs should be determined on a total company (i.e., unseparated) basis. However, it then compares those costs to NYNEX's local rate to determine the resale discount. That comparison will overstate the discount because a proportion of NYNEX's link costs are recovered from the interstate jurisdiction (e.g., the End User Common Line Charge). Although we could relate the unseparated avoided costs to total company (inter and intrastate) revenues, we do not have sufficient information in the record to make this calculation. We will, therefore, use intrastate jurisdictional costs and revenues as awarded by the New Hampshire Arbitrator to determine the wholesale discount, because, in our view, these offer the best "match" and thus produce the most reliable factors available to us.

For these reasons, in addition to the reasons articulated by the New Hampshire Arbitrator, we adopt the awards of the New Hampshire Arbitrator, except that Maine-specific 1995 ARMIS 43.04 NEME reports to the FCC shall be used. NYNEX shall file that data by December 13, 1996. This decision shall be subject to further consideration if the FCC's Interconnection Order is vacated or altered. See discussion under Issue 40 below.

J. Issue 22(b) - Discounts for Resold Services - Residence and Business Discounts

1. Award of the New Hampshire Arbitrator

Description of Issue: The discounts to be applied to resold NYNEX services purchased by AT&T. There will be separate discounts for residence and business resold services.

Position of the parties

Both NYNEX and AT&T agreed to separate discounts for business and residence. In addition AT&T agreed that the methodology employed by NYNEX to spread the overall discount to business and residence would be used. Despite the specific awards in issue 22a, there were still differences in the results between AT&T and NYNEX. The four major issues were the different methods for exclusion of coin telephone expenses and revenues from the studies per the recent FCC order; the inclusion/non-inclusion of return [$35.3M] in the total direct expenses; use of overall separations factors by account as opposed to the individual separations factors per separations categories; and the inclusion/non-inclusion of taxes in the total direct expenses.

The first issue - exclusion of coin telephone expenses and revenues from the studies caused questions on exactly which revenues should be included and if there were a shortfall should a "netting" process similar to that used for operator services be used. After considerable discussion, it was still difficult to determine with any certainty exactly which revenues should be used. NYNEX believed that these revenues were bundled with other revenues which made the exclusion of the appropriate revenues exceedingly difficult. AT&T did not have specific information *but believed that there may be a shortfall of revenues based on a summary analysis of expense and revenue data. Concerning the second issue, NYNEX believed that return should be included in the total direct expenses while AT&T did not. In the third issue, AT&T believed that a significant portion of the Interexchange Carrier Service Center expenses (ICSC) [$2.36 million - intrastate factor $1.85 million] would be allocated to the state jurisdiction, even though the specific separations allocator is predominately interstate. This caused an overallocation of costs that should be avoided to intrastate. NYNEX believed that if AT&T wanted to look at this particular function that has a separate separations factor, that all functions that had separate separations factors should also be investigated. Unfortunately there was not time for this analysis. According to NYNEX, the fourth issue is really an extension of the return issue. Unfortunately this was not included in any calculation by NYNEX, but it should have been. AT&T believed that these expenses should not be included in the calculation of the indirect factor.*

Arbitrator's Analysis

Although it would have been ideal, the primary purpose of this issue was to develop the actual discounts that are to be applied to the various rates for the services subject to resale and not to reconcile the two approaches advocated by AT&T and NYNEX in the calculation of these discounts. As a result of applying the awards in issue 22a, the following rates were calculated. As can be seen, AT&T and NYNEX still had different rates up to the end.

The first issue on the exclusion of coin telephone expenses and revenues from the studies per the recent FCC order is not an easy issue since it is trying to forecast the effect of the FCC order on historical information. Further complicating this issue is that because of the newness of this order, NYNEX may not have completely developed their corporate strategy in regards to this issue. In addition, the current accounting system may not provide enough detail on pay telephone, especially with regards *to revenue. The second issue is more an issue of symmetry. Since it was awarded that return and taxes associated with the avoided general support facilities and operator services investments was also avoided, it would seem reasonable that these same "expenses", return and taxes should also be included for the non-avoided investments. The third issue stems from the decision to use "account" level separations factors rather than specific separations factors by specific separations category. While this is not usually a problem, in the case of account 6623 and local business office category, this is a problem because of the sheer number of subcategories and most of these are directly assigned. It would appear that the overall separations allocation to intrastate is correct, but in the case highlighted by AT&T, there appears to be a mismatch. Since the overall intrastate amount is correct, this would mean that any adjustment in the Interexchange Carrier Service Center expense would require an offsetting adjustment in another subcategory or subcategories. The fourth issue concerning taxes is covered in the previous discussion on return.*

Arbitrator's Award

The four issues are awarded as follows:

1. Exclusion of pay telephone expenses and revenues.

As stated above, this is not an easy process. There was not sufficient time to iron out the differences regarding the different approaches associated with the exclusion of coin telephone expenses and revenues. Therefore as was indicated to both parties, if these differences could not be arbitrated quickly, then the differences would be "mid-pointed". Both parties agreed that the overall difference between the models on this issue is 0.7 percentage points (0.0075). Therefore each model will be adjusted by 0.35 percentage points. Each of NYNEX's factors will be adjusted upward by 0.0035 and each of AT&T's factors will be adjusted downward by 0.0035.

2. Return included in direct expenses

For the reasons stated above, it is awarded that return should be included in the total direct expenses. Since NYNEX included return in their calculation of the factors, no adjustment is necessary. Since AT&T did not include return in their calculation of the factors, AT&T's rates need to be adjusted downward by 0.7 percentage points (0.007). This number was agreed to by both NYNEX and AT&T.

3. Inaccurate allocation and treatment of Interexchange Carrier Service Center expense

The effect of this problem has not been accurately calculated. However, one very rough estimate indicated that the effect of increasing the indirect allocation factor is less than 0.1 percentage points (0.001). If there had been more time, changes would have probably been made in order that a more accurate effect could be determined and used. This award is tied to the next award, since it is anticipated that they will be offsetting to some extent. Since this change was not reflected in the rates of either AT&T or NYNEX, no change is required.

4. Taxes included in direct expenses

This was not included in the revised calculations, but probably should have been as discussed above. Preliminary estimates indicate that this change may change the percentage downward by a full percentage point. While NYNEX did not include this change in their calculations, if there had been more time available, changes would probably have been made and a more accurate effect could be determined and used. As stated in award #3, this award is tied to the above award and is expected to be offsetting to some extent. Since this change was not reflected in the rates of either AT&T or NYNEX, no change is required.

The different rates and the effect of the above awards is indicated below. The "Award" column should be 0.035 higher than NYNEX's rate and 0.1050 lower than AT&T's rates. The "Award" column contains the awarded rates.

Wholesale Discount Rates

	NYNEX	***AT&T***	***Award***
With Operator Service provided by NYNEX			
Business	*18.43%*	*19.83%*	*18.78%*
Residence	*16.95%*	*18.35%*	*17.30%*
With Operator Service provided by AT&T			
Business	*19.90%*	*21.30%*	*20.25%*
Residence	*18.69%*	*20.09%*	*19.04%*

2. Decision

We adopt the awards of the New Hampshire Arbitrator, except that the Maine-specific costs (based on Maine ARMIS) from Issue 22(a) shall be used. NYNEX shall file Maine-specific costs no later than December 13, 1996. At the same time, NYNEX shall recalculate the New Hampshire awards shown above using the Maine-specific costs. We interpret the decimal figure of 0.0075 in paragraph 1 of the Arbitrator's Award above to represent 0.0070, equivalent to the two differences of 0.0035 being added. We further understand the decimal figures of 0.035 and 0.1050 in the last paragraph of the Arbitrator's Award above the table "Wholesale Discount Rates" to represent 0.35% and 1.05%, respectively.

K. Issue 24 - Compensation for Providing Unrated Call Information for Local Measured Service

1. Award of the New Hampshire Arbitrator

Issue Description

The specific issue is whether NYNEX is entitled to *compensation when it incurs additional costs in providing unrated call usage detail for AT&T as a reseller, on a daily basis, that is not included in the wholesale rates for resold services. The level of compensation is not at issue here, only whether compensation is due at all.*

Position of Parties

NYNEX believes that it will incur additional costs in providing the information requested by AT&T as a reseller and therefore is entitled to compensation for those costs. At least five steps have been identified as necessary to create this information provision system. The steps for processing sent paid messages are:

1. *Determine if AMA record is for a resold line and if so, identify which reseller is involved.*

2. *Copy "resell" AMA record.*

3. *Convert "resell" AMA record to "resell" EMR record.*

4. *Sort "resell" EMR record by reseller identity.*

5. *Transmit sorted "resell" EMR records to reseller.*

Since the additional costs to accomplish those steps are not included in NYNEX's wholesale rates for resold services, NYNEX argues that a separate charge to AT&T is appropriate.

AT&T was not sure that NYNEX would incur any additional costs and, assuming there were any additional costs, whether the costs were or were not included in NYNEX wholesale rates. If NYNEX did in fact incur additional costs and they were in fact not included in NYNEX wholesale rates, AT&T was unsure whether NYNEX was entitled to compensation. AT&T also argued that, since AT&T would incur costs processing these records that they receive from NYNEX in order to bill their end user customers and AT&T

would not bill NYNEX for these additional costs, NYNEX should not bill AT&T for NYNEX's additional costs, if any.

Arbitrator's Analysis

After explanations by NYNEX concerning the general characteristics of the requested changes by the resellers for unrated call usage detail records in the EMR format on a daily basis, AT&T seemed to acknowledge that there might in fact be at least some recurring costs involved. While there may also be some developmental costs involved, NYNEX stated that these costs were not going to be recovered through recurring rates. It appeared that AT&T's concern was more focused on the rate level for these services, especially in light of recent developments in New York. However, the rate level is not an issue that will be resolved in this particular arbitration.

After further discussion, AT&T's logic underlying their desire for a mutual "no bill" arrangement for these additional costs is understood to be a concern regarding continued "nickel and dime" charges to AT&T from NYNEX that are not fully understood by AT&T but are nonetheless payable by AT&T to NYNEX. Per AT&T, these yet to be identified costs could, for example, be sprung on them by NYNEX over the next three years with a demand for payment back to the original date of the execution of the contract. AT&T argued that such surprises could make an already unstable environment even more unstable. While this was not the direct issue, NYNEX appeared to be agreeable to developing some language to be included in the contract that may address at least some of the issues that concern AT&T.

Arbitrator's Award

This very narrow issue is decided in the affirmative. Yes, NYNEX is entitled to compensation for additional costs that are not included in NYNEX wholesale rates but are actually incurred in providing unrated call usage detail on a daily basis in EMR format to AT&T so that AT&T can bill their end users. What the level of costs that should be recovered and what the rate level *should be are not at issue here.*

2. Decision

We adopt the final award of the New Hampshire Arbitrator, notwithstanding the current absence of any local measured service in Maine, because of the possibility that NYNEX could lawfully introduce some forms of local measured service.

> Partial Dissent of Commissioner Hunt: NYNEX does not currently offer Local Measured Service as a basic local service option in Maine. Therefore, I dissent from the majority's decision regarding Issue 24 because the issue is not ripe.

L. Issue 28 - Customer Proprietary Network Information (CPNI)

1. Award of the New Hampshire Arbitrator

Description of Issue

This issue concerns the use of information by NYNEX for marketing purposes relating to AT&T's "local" customers by virtue of resale.

Parties' Positions

AT&T vehemently opposes the use of any information derived from their customer's use of the NYNEX network for marketing purposes by NYNEX. AT&T bases its position on section 222(b) of the Act, which says that "a telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts." AT&T argues that it has a carrier relationship with NYNEX, not a customer relationship. Since CPNI rules only apply to customer information, the CPNI rules do not apply in this situation. AT&T

does not seem to oppose the use of this information for other functions, e.g., network administration. Nor does AT&T oppose the use of information by NYNEX marketing that NYNEX may receive from other sources, e.g., surveys. AT&T is requesting a mandatory proprietary agreement in the contract with NYNEX or in the alternative structural safeguards to protect this information.

NYNEX, on the other hand believes that the current CPNI restrictions do apply and are sufficient. There is no need for a mandatory proprietary agreement or structural safeguards. According to NYNEX, AT&T is a NYNEX customer because AT&T is reselling NYNEX services. NYNEX bases its position on section 222(c)(3) which says that "a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service may use, disclose, or permit access to aggregate customer information other than for the purposes described in paragraph (1)," which includes the use of such "individually identifiable customer proprietary network information in the provision of the telecommunications service from which such information is derived or services necessary to, or used in, the provision of such telecommunications services, including the publishing of directories." Furthermore CPNI is defined in section 222(f)(1)(A) as "information that relates to the quantity, technical specifications, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship." The CPNI rules do not apply an absolute restriction on the use of proprietary network information by marketing, but rather set up broad guidelines that must be followed before any information can be used by marketing. These rules are currently being investigated by the FCC and are a part of CC96-115. NYNEX would be willing to comply with any and all requirements of the final order in that docket.

Arbitrator's Discussion

There appears to be three types of information. The first *is information that is required by NYNEX from the carrier for network planning. This information usually includes forecasted usage. Since this information is proprietary information obtained from AT&T, NYNEX marketing cannot use this information. This is not disputed by either AT&T or NYNEX. A second type of information could be obtained from sources other than the network. Such sources include surveys, publications, etc. This type of information can be used by NYNEX marketing. This too is not disputed by either NYNEX or AT&T.*

It is the third type of information that causes the problem. This information is derived from NYNEX's network, e.g., traffic volumes, holding times, etc. NYNEX argues that this type of information meets the definition of CPNI and therefore should be usable by its marketing department under certain conditions, e.g., aggregate customer information. Under section 222(f)(2), aggregate customer information means collective data that relates to a group or category of services or customers, from which individual customer identities and characteristics have been removed." AT&T argues that this information is not CPNI by virtue of this information coming to NYNEX via AT&T's status as a carrier.

Arbitrator's Award

There is no disagreement as to how the first two categories of information are to be handled. The first type is guaranteed confidentiality because NYNEX is requiring and receiving proprietary information from AT&T, e.g., forecasts, so that NYNEX can provide service. This is not information that NYNEX can get from its own network. Under section 222(a) "every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunications carriers reselling telecommunications service provided by a telecommunications carrier. This information is clearly proprietary, in that these forecasts are the property of AT&T and belong solely to AT&T. Therefore NYNEX marketing will never receive this information.

Likewise there is no disagreement about information NYNEX gleans from other sources, e.g., market surveys. This is information not derived from AT&T, in this case, nor from NYNEX's network. This information is available to NYNEX marketing.

The third type of information, e.g., information derived from NYNEX's network, requires further analysis. The key decision is whether AT&T has a carrier relationship with NYNEX or has a customer relationship with NYNEX. It appears that if AT&T were requesting to interconnect their network with NYNEX's network for the mutual handling of calls, then there is a clear carrier to carrier relationship, as in the case of access. However, in the case of resale, AT&T is purchasing a service from NYNEX. Therefore there must be a customer relationship between AT&T and NYNEX, rather than a carrier relationship. Since AT&T is a customer of NYNEX, the CPNI rules apply to the resold traffic only.

As AT&T argued, there are additional concerns with the special relationship that exists when NYNEX is the provider of wholesale services to AT&T necessary to compete with NYNEX. It is easy to understand the sensitivity of any one in AT&T's position. The rules outlined in the Act regarding CPNI are fairly steep. As stated above, proprietary information provided by AT&T must be protected by NYNEX and not allowed to be used in marketing activities. In addition the Act clearly requires that under section 222(c)(3) if a carrier does use CPNI for other than the purposes stated in 222(c)(1), e.g., provisioning the telecommunications services from which the information is derived and the provisioning of services necessary to, or used in , the provision of such telecommunications services, including the publishing of directories, it must only provide <u>aggregate</u> information to itself and others. As described in section 222(f)(2), information is aggregated only when "individual customer identities and characteristics have been removed". This is not as easy as may first appear. AT&T is a single customer to NYNEX, even though AT&T will probably have many customers itself. Therefore under no circumstances can NYNEX use AT&T's customer information for the purposes described in 222(c)(3) referenced *above and furthermore can only use it when the customer (AT&T) identity and characteristics have been removed. If AT&T is the majority reseller, it would appear to be very difficult to remove the identity and characteristics of AT&T from total reseller traffic.*

In order to allow AT&T to know about potential problems, NYNEX must inform AT&T in writing, whenever AT&T CPNI will be used for purposes other than described in 222(c)(1) in the Act at least 10 days before it intends to use the CPNI. The written information must include a brief description of the CPNI to be provided; to whom provided; for what general purpose, e.g., marketing; the level of aggregation provided; and a signed affirmation that AT&T's identity and characteristics have been removed. If AT&T believes that this is a violation of the CPNI rules, it has to respond to NYNEX in writing within 7 days and must file a complaint with the Commission regarding the alleged CPNI violation. The burden of proof will be on NYNEX to prove that this is not a violation. If the Commission does not act within 7 days of the filing of the complaint, then NYNEX can release the information as described.

The FCC is relooking at their CPNI rules in CC96-115. This award can be amended in the future so as not to directly violate any and all FCC orders in this or related dockets.

2. Decision

We adopt in part and modify in part the New Hampshire Arbitrator's decision. This issue involves questions of whether proprietary information belonging to AT&T constitutes carrier proprietary information (CPI) or customer proprietary network information (CPNI) and the protection afforded to those categories. These issues are governed by 47 U.S.C. § 222, enacted as part of the Telecommunications Act of 1996.

Our decision departs in certain respects from the Award granted by the Arbitrator in New Hampshire. The New Hampshire Arbitrator ruled that when AT&T purchases local service from NYNEX at a wholesale rate, AT&T is a "customer" of NYNEX under section 222(c), and its information is customer proprietary network information (CPNI) and thus subject to the protection under subsection (c). The Arbitrator further ruled that AT&T in those circumstances is not a "carrier," its information is not "carrier proprietary information" (CPI) pursuant to subsection (b), and will not receive the protection that is required under subsection (b) for CPI. Conversely, when AT&T is purchasing unbundled elements, it will be considered a carrier and its information is subject to the CPI provisions of subsection (b).

The Maine Advisors asked the parties to address the question of whether Congress intended that there be separate and somewhat different protection for similar material based solely on whether an entity providing local service was facilities-based, using network elements purchased from an ILEC, or was a reseller purchasing local service at a wholesale rate. The Advisors also asked whether CPI (under subsection (b)) was actually a broader category of information than CPNI (under subsection (c)), as AT&T seemed to claim in New Hampshire. NYNEX, AT&T and MCI replied.

We note first the limited nature of the issue before us and the limited effect of our decision. The issues in question are governed comprehensively (although not clearly) by statute, 47 U.S.C. § 222. There is no need to make the statute part of the Interconnection Agreement; it governs in any event. The parties have asked in effect that the Commission's <u>interpretation</u> of the statute become part of the Interconnection Agreement. Beyond the express authority under section 252 for state commissions to decide the terms and conditions of an interconnection agreement in an arbitration proceeding, it is not clear that we have any enforcement jurisdiction over section 222.

We rule that proprietary information provided by AT&T to NYNEX pursuant to the Interconnection Agreement is "carrier proprietary information" within the meaning of section 222(b) regardless of whether AT&T is purchasing unbundled elements for its use as a facilities-based carrier or is purchasing discounted wholesale local service for the purpose of resale. We see no reason for any policy distinction under those two circumstances. Nor do we believe that it is appropriate to read the term "another carrier" in subsection (b) to limit protection under that subsection to facilities-based carriers. Section 222(b) does not make any distinction among types of "telecommunications carriers."

That resellers are carriers within the meaning of subsection (b) is established by language in subsection (a), which states the general obligation to protect "proprietary information" of various entities, "including <u>telecommunications carriers reselling</u> telecommunications services provided by a telecommunications carrier." In addition, nothing in the Communications Act definitional provisions gives any indication that the term "telecommunications carrier" implies only facilities-based carriers. Section 153(44) ("telecommunications carrier"; new in 1996) and section 153(10) ("common carrier" or "carrier") (pre-1996; by its own terms applicable only to interstate service) are both phrased generally.

Simultaneously, we cannot escape the conclusion that, when AT&T purchases unbundled elements and when it resells from a wholesale rate, it is also a "customer" of NYNEX. Accordingly, information belonging to AT&T that has been provided to NYNEX as part of the customer (AT&T) -- carrier (NYNEX) relationship that constitutes "customer proprietary network information" (CPNI), as defined in section 222(f)(1), is subject to the protections and restrictions on the use of that information provided in subsection (c). We have considered the possibility that the "customer" subsections (c), (d) and (f) should be read as applying solely to information provided pursuant to relationships between retail customers and carriers. However, it plainly applies to any customer-carrier relationship, including that involving a wholesale customer. Section 222 was enacted as part of the Telecommunications Act of 1996, and we assume that Congress was aware of wholesale customer-carrier relationships, because Congress simultaneously enacted sections 251 and 252, which deal extensively with those relationships.

We recognize that CPI is not identical to CPNI and that the extent of protection under sections 222(b) and 222(c) may conflict. Because of the purpose of this section, we decide that if a piece of information constitutes both CPI and CPNI, protection must be provided under subsection (b) even though subsection (c) would not provide protection, and vice versa. Conflicts in the protection available are not inevitable, however. For example, where the information constitutes AT&T's CPI, NYNEX cannot use it for "its own marketing efforts." Section 222(b). The same information may also constitute AT&T's CPNI. Nevertheless, as long as it is not used for NYNEX's own marketing efforts, it may, if aggregated in such a way as to hide identity, be provided to third parties as are described in subsection (c)(3).

The New Hampshire Arbitrator also adopted a notice requirement. NYNEX must provide notice to AT&T prior to using AT&T's CPNI in any manner "other than" under subsection (c)(1)(A). We adopt a similar notice requirement, but believe that it should apply only to the use of CPNI by NYNEX under subsection (c)(3), i.e., in circumstances other than (c)(1) <u>and</u> (c)(2). (The latter provision allows NYNEX to provide information to any person when the customer has requested in writing that the information be provided. There is no need for notice in those circumstances.)

M. Issue 29 - Alternate Dispute Resolution

1. Award of the New Hampshire Arbitrator

Position of the parties:

Both AT&T and NYNEX agreed that there was no specific *language in the FCC Rules, FCC First Report or the Act that required an ADR process be included in any contract. NYNEX also stated that there is already in place a dispute resolution processs by virtue of the Commission's complaint process. However, it was noted after discussion, that some sort of process for resolving disputes should probably be included in the contract. Furthermore the Commission should probably be involved if for no other reason than they have to initially approve the contract and should therefore have to be involved in any changes to the original contract.*

Arbitrator's Discussion

It is evident that not all contingencies will be able to be included in the contract between NYNEX and AT&T. In addition, there may be occasions in the future where the two parties may disagree over portions of the contract. Therefore some sort of ADR would be warranted. As stated above, this ADR process should include the Commission, since the Commission has approval over the contract. The ADR process must be expedient.

Arbitrator's Award

The award consists of a 150 day process from beginning to end. There are three phases, negotiation, mediation and arbitration. The last two phases will be under the control of the Commission. The 150 day clock starts when either party initiates a formal contact, in writing to the other party. It is hoped that during this minimum 30 day period, the two parties will try to resolve the issue. Once this 30 day period has elapsed, either party can petition the Commission and request mediation. This starts the next 60 day phase. Within the first 10 days of this 60 day phase, it is expected that the Commission will assign a mediator. It is up to the Commission to decide who the mediator will be. After the 45th day of this 60 day phase, the mediator can declare that the mediations are deadlocked. At this time or when the normal 60 days have expired and there is no agreement, either party can petition the Commission for arbitration. The Commission has 10 days to select an arbitrator.

It is up to the Commission to decide who the arbitrator will be. The 60 day arbitration clock starts after the 10th day. It is hoped that these dates will be treated as "not later than" dates and all deliberate speed will be undertaken.

In past arbitration awards, there were arbitration processes set forth, e.g., Branding and Reservation of space. There was a time limit set forth in each of these awards, but there was no assignment of responsibility for arbitration. This award does not change the dates of any of these awards or any future awards. However, this award firmly establishes that the Commission has the responsibility for any and all arbitrations/mediations to insure compliance with the Act. Therefore, these awards are modified to make sure that it is the Commission that oversees the arbitrations/mediations. One way that the Commission exercises its authority is by selecting who the mediator/arbitrator will be.

It is anticipated that both parties will share equally in the expense to the Commission caused by this process. In addition, if, in the Commission's judgement, one party's filing appears to be particularly and/or consistently frivolous, then the Commission may decide that this party bear the entire costs of the process.

2. Decision

We adopt the final award of the New Hampshire Arbitrator, except that the result of the negotiation, mediation, or arbitration process will be directly subject to review and approval by the Commission if the dispute is within the jurisdiction of the Commission.

N. Issue 30(c) - Resale Tariff Restriction

1. Award of the New Hampshire Arbitrator

Issue

There may arise additional resale restrictions as the contract progresses. A mechanism must be devised to quickly resolve these issues.

Positions of the Parties

NYNEX identified three scenarios where alleged additional resale restrictions may be identified and will need to be removed quickly if found to be an actual restriction. Two of these scenarios occur with existing tariffs and one of these scenarios occurs with new tariffs.

In the case of new tariffs, these tariffs will have to be filed with and approved by the Commission. AT&T will have the opportunity to present any and all of their concerns to the Commission, as will any other interested party.

In the case of existing tariffs, NYNEX maintains that any obvious resale restriction will be removed from their tariff once it has been identified by AT&T. NYNEX has agreed to remove from its tariffs both of the resale restrictions brought to its attention by AT&T thus far. NYNEX has indicated that as long as this process is active, it will continue to review any potential obvious restrictions identified by AT&T and make adjustments accordingly. For the duration of this arbitration process AT&T can either have NYNEX remove these restrictions via negotiation or arbitration.

It is the last scenario that has no clearly defined process for resolution. This scenario occurs regarding resale restrictions identified after this process is completed. Both AT&T and NYNEX recognize that a process needs to be articulated.

Arbitrator's Analysis

The position of the parties adequately defines the issue to be arbitrated, that is, whether the existing alternative dispute resolution process or some other process should be employed. The only readily apparent reason for a new dispute resolution process *would be to have a more expedited process than the current alternative dispute resolution process.*

While it is important to remove quickly all unreasonable restrictions to resale, setting up a distinctly different process could make an already complicated process even more complicated. Therefore, unless there is some overriding and compelling reason for a completely separate process, efforts should be made to use the existing processes. The current ADR process should be sufficient and will be awarded.

Arbitrator's Award

The current Alterative Dispute Resolution Process is awarded as the process to handle alleged unreasonable resale restrictions that are discovered existing in current tariffs after this arbitration process has completed.

2. Decision

We adopt the final award of the New Hampshire Arbitrator.

O. Issue 30(e) - Directory Listing for Centrex

1. Award of the New Hampshire Arbitrator

Issue Description:

Basic service includes one free directory listing. Resold basic service also includes one free directory listing. AT&T wants to purchase NYNEX Centrex and wants each AT&T customer on the Centrex to receive from NYNEX free directory listings. NYNEX objects to the request for more than one free directory listing.

Positions of the Parties

NYNEX agrees to provide any number of listings to any and all AT&T customers using resold NYNEX Centrex. However, all *listings above the one free listing that it provides under its own tariff will be provided at a price. NYNEX argues that, consistent with prior arbitration awards concerning resale, a reseller is entitled to sell those retail services that are available to end users at the same terms and conditions as are available to end users. NYNEX references 51.603(b), which states: "(A) LEC must provide services to requesting telecommunications carriers for resale that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the LEC provides these services to others, including end users". NYNEX argues that complying with AT&T's request would go beyond what 51.603(b) requires, resulting in NYNEX providing service to AT&T that is in fact superior to that provided to its own customers.*

AT&T argues that they will be disadvantaged if they buy Centrex in larger bulk quantities rather than buying in smaller quantities because, under current tariffs and special contracts, NYNEX only grants one free directory listing regardless of the quantity of the CENTREX lines purchased.

Arbitrator's Analysis

It is difficult to understand exactly how AT&T will be disadvantaged as a result of buying Centrex lines in larger quantities. If the issue of free directory listings is that important, AT&T has the right to buy smaller quantities of Centrex lines. By buying the same amount of CENTREX but in smaller quantities, then the rate may be higher but the number of free listings will increase.

Applying the additional tests, from prior arbitration awards, we look to see whether additional free directory listings are provisioned in any NYNEX Centrex offerings. If there are NYNEX Centrex offerings which provision more than one free directory listing, then this option must be made available for resale. Otherwise an unreasonable restriction of resale would exist. However, the provisioning of more than one free directory listing is not available in any other NYNEX Centrex offering. Therefore, *it is not required to be made available for resale.*

Arbitrator's Award

Since it has been represented and uncontroverted that there are no Centrex offerings under tariff or special contract in New Hampshire which provide multiple free directory listings, AT&T's request does not meet the requirements for lifting the restriction. Accordingly, NYNEX is not required to provide free multiple directory listings as part of its Centrex offering to AT&T for resale.

2. Decision

NYNEX states that "Maine tariff provisions on directory listings are the same" as in New Hampshire. Thus, we adopt the final award of the New Hampshire Arbitrator.

P. Issue 30(f) - Elimination of Resale Restrictions - Volume Discounts

1. Award of the New Hampshire Arbitrator

Issue:

The issue is whether AT&T, as a wholesale purchaser of NYNEX Centrex services for resale, is bound by the same terms and conditions which appear in NYNEX retail tariffs. In particular, but not necessarily limited to, the issue is whether aggregation of AT&T resold traffic is confined to the same terms and conditions as NYNEX retail customer's traffic which is not aggregated.

Position of Parties

NYNEX states that, consistent with prior awards concerning resale, a reseller is entitled to sell only those retail services that are available to end users, according to the terms and conditions available to end users. NYNEX references 51.603(b) *that states a "LEC must provide services to requesting telecommunications carriers for resale that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the LEC provides these services to others, including end users." NYNEX argues that complying with AT&T's requests, NYNEX would be providing service to AT&T that is not the same, but in fact superior to that provided to its own customers.*

In addition, NYNEX references Paragraph 953, in which the FCC states "With respect to volume discount offerings, however, we conclude that it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, <u>under the relevant tariff</u>, meets the minimum level of demand". The emphasis is added by NYNEX to the words "under the relevant tariff". NYNEX also references Paragraph 332. In that paragraph the FCC states that "More specifically, carriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail. This means that resellers cannot offer services or products that incumbents do not offer. The only means by which a reseller can distinguish the services it offers from those of an incumbent, NYNEX argues, is through price, billing services, marketing efforts, and to some extent, customer service. Furthermore, the ability of a reseller to differentiate its products based on price is limited by the margin between the retail and wholesale price of the product."

NYNEX also refers to Paragraph 872 of the First Report and Order, which directs resellers to a LEC's retail tariffs in order to determine the services an incumbent LEC must provide at wholesale rates for resale. Paragraph 872 concludes: "The Act does not require an incumbent LEC to make a wholesale offering of any service that the incumbent LEC does not offer to retail customers." NYNEX cites this paragraph to support its argument that only the services in the tariff, including the terms and conditions of service in the tariff, are available to AT&T.

Finally, NYNEX cites Paragraph 970 states that "service made available for resale be at least equal in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the carrier directly provides the service, such as end users. Practices to the contrary violate the 1996 Act's prohibition of discriminatory restrictions, limitations, or prohibitions on resale." NYNEX argues, therefore, that requiring provision of services which are more than equal in quality to that provided by the incumbent LEC would violate the Act.

AT&T replied that the key to this question is not so much what the tariff itself says but whether the tariff contains unreasonable restrictions on resale. AT&T points to many of the same paragraphs as NYNEX but emphasizes the FCC's conclusion that resale restrictions are presumptively unreasonable. AT&T relies especially on the portion of Paragraph 953 which states that:

> *"restrictions on resale of volume discounts will frequently produce anti-competitive result without sufficient justification. We therefore, conclude that such restrictions should be considered presumptively unreasonable".*

AT&T also references Paragraph 939, where the FCC essentially concludes that all resale restrictions are presumptively unreasonable

> *"....Given the probability that restrictions and conditions may have anti-competitive results, we conclude that it is consistent with the pro-competitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable and therefore in violation of section 251[c][4]".*

Arbitrator's Analysis

As demonstrated by the cites provided by the respective parties, the FCC's order appears to contain conflicting language.

In addition to the order, reference on this issue may be made to the rules propounded by the FCC. For instance:

51.605[b] states that: "Except as provided in 51.613 of this part, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC".

51.613[a] states that restrictions on resale may be imposed with regard to particular cross-class selling and to short term promotions.

51.613[b] states "with respect to any restrictions on resale not permitted under paragraph [a], an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory".

As pointed out above, both the FCC rules and order are inconsistent to at least some extent. One way to unravel this apparent contradiction is to discern whether one principle overrides the other. However, the Act appears to be less ambiguous and the Act is the document which must be given the greatest weight when resolving apparent conflicts. Section 251[c][4][b] states that an incumbent LEC has the duty

> *"not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers".*

Accordingly, it appears that the prevailing, overriding principle is that of strictly limiting the restrictions placed on resale except in certain sharply defined instances. The lesser but *important principles must also be considered. Therefore, the test for resale must be supplemented or otherwise elaborated to include this hierarchy of concerns.*

Arbitrator's Award

In addition to the previously awarded tests for resale, which determines the services available for resale and to whom, a new test for restriction is added that consists of the following three resale restriction subtests:

A. Existence of non- technical restriction that limits resale

Is there a restriction, either explicit or implicit, that limits resale? If so, then is this restriction due to a technical reason, e.g., network limitation? If the reason is technical, then the restriction need not be lifted. However, if the reason for the limitation is not technical, then a further test needs to be considered.

B. Non-technical restriction of resale that prevents use of another option, otherwise available

If the non-technical restriction prevents use of another option that is otherwise available (i.e, absent the restriction), e.g., existing volume discounts, then yet another test needs to be considered. If the non-technical restriction does not prevent the use of another option that is otherwise available, then the restriction need not be lifted.

C. Creation of a new service that is not provided to subscribers

If the restriction to be lifted does not create a new service, the restriction needs to be lifted for resellers. It need not be lifted for the retail tariff itself; only for the restriction(s) for the reseller. If the restriction to be lifted creates a new service that is not otherwise available, then the restriction *need not be lifted for the reseller. Since no new service is created in this situation, this portion of the test does not apply here.*

Applying the above subtests to this issue, results in the following analysis: First of all AT&T asserts that limiting volume discounts only to the retail tariffs is an unnecessary restriction. Per test A it is clear that this is not a technical restriction. Applying test B indicates that this restriction does indeed prevent the use of an otherwise available option. This leads to test C which investigates whether this lifting of the restriction would create a new service. In this case, it does not since these discounts are already available. Having met these tests, this particular restriction must be lifted, but only for the reseller.

It is expected that the parties to the contract will attempt to resolve these issues between themselves as they arise, pursuant to this elaborated test. However, if this proves not possible, then this issue can go to the alternative dispute resolution process awarded earlier.

2. Decision

The New Hampshire Arbitrator ruled that retail local service discounts available in NYNEX's tariff for high volume retail customers must be made available to AT&T when AT&T purchases the amount of local service required under NYNEX's tariff for the discount to apply, even though AT&T was not purchasing the service for its own use (as a single end-user customer) but was aggregating the traffic of several smaller customers. The New Hampshire Arbitrator further ruled that any limitation of the resale of such discounts was an unreasonable restriction on resale under 47 U.S.C. § 251(c)(4)(B). That provision states that incumbent local exchange carriers have the duty:

> (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the

> resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

The "except" clause of this provision allows a state commission to discourage arbitrage. It is designed to prevent a reseller from purchasing a retail product that is available only for a restricted portion of the market, and reselling that product to other segments. One example is arbitrage of the difference between the prices for residential local service and business local service. If a reseller were permitted to purchase residential service and sell it to business customers, either: (1) the reseller would greatly discount its rate for business service, with the probable result that the original seller would be forced to do the same (and possibly increase residential rates); or (2) the reseller would sell business service at about the same rate as the original seller and reap a windfall profit.

This issue presents a similar problem. NYNEX's tariff contains local service discounts for high volume customers. If AT&T in its role as a reseller is allowed to obtain the discount because it purchases a large number of access lines, not for its own use but for resale to low volume customers, it could either reap windfall profits or undercut NYNEX's local rates for customers who have a small number of access lines without providing any cost savings to NYNEX. Chapter 280, § 8(C)(1)(a) prevents this form of arbitrage for toll services by requiring that access charge discounts be based on the calling volume of IXCs' end-users' location rather than on the total amount of access purchased by the IXC itself. The same policy should apply for local services.

In light of the purpose of section 251(c)(4)(B) to prevent arbitrage, the phrase "category of subscribers" in the exception portion of that provision should be read to include classifications based on calling volumes and other indicia of size where those calling volumes result in lower costs to NYNEX.

We recognize, as argued by AT&T, that the FCC has ruled that section 251(c)(4)(B) "presumptively" applies only to the residential-business distinction and to Lifeline services, and that it "presumptively" should not apply to other classification, including retail volume discounts. The regulation stating that prohibition (47 C.F.R. § 51.605(b)) has been stayed by the Eighth Circuit on the ground that the appellants had shown a reasonable likelihood that interconnection pricing issues under section 251 and 252 must be decided by the state commissions. Until the final decision by the Eighth Circuit, the FCC's rule is not binding on the states.

The FCC stated that restrictions other than those for residential-business and Lifeline "could fetter the emergence of competition" and that "restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification." Interconnection Order, ¶¶ 963, 953. Congress intended that resellers receive a discount equal to the cost that ILECs avoid by selling in bulk to resellers. 47 U.S.C. § 252(d)(3). We do not believe that Congress intended a further windfall discount where there are no cost savings to NYNEX.

Accordingly, we find that AT&T may not receive volume discounts based on its own purchase volumes, unless AT&T physically aggregates its customers' traffic so as to present a single geographic point of presence to NYNEX for those customers' traffic, which results in a reduction in the costs to NYNEX to serve those customers. Tariff restrictions by NYNEX that require volume discounts to be limited to those instances where AT&T provides the same locational cost savings to NYNEX as it would experience with a large customer location do not constitute an unreasonable or discriminatory limitation on resale under 47 U.S.C. § 251(c)(4)(B). AT&T shall receive a volume discount when its retail customer would qualify for the volume discount under NYNEX's retail tariff.

Q. **Issue 30(g) - Business vs. Residence Usage**

1. Award of the New Hampshire Arbitrator

Issue

The issue here is whether the res-bus classification of an underlying service of a particular line classifies the line for any vertical service, feature, usage, etc. purchased in association with that line. Does an AT&T residential customer-by virtue-of-resale of NYNEX Centrex, a business service, become a business customer for other services? More specifically, if a residential customer purchases residential service from AT&T and AT&T satisfies this service request via a Centrex line resold by AT&T, can AT&T purchase only business services for that Centrex line since the underlying basic service is a business service? If the residential customer does become transformed into a business customer on the basis of a purchase of resold Centrex, and therefore subject to business rates, does that transformation represent an unreasonable restriction on resale?

Positions of the Parties

NYNEX argues that the existing NYNEX tariff determines the availability and terms of services for resale, referring to Paragraph 872 of the First Report and Order. Paragraph 872 states "...resellers can determine the services that an incumbent LEC must provide at wholesale rates by examining that LEC's retail tariffs. The 1996 ACT does not require an incumbent LEC to make a wholesale offering of any service that the incumbent LEC does not offer to retail customers". In addition, NYNEX points to Section 251[c][4][a] of the Act, which states that the duty of the incumbent LEC is to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." NYNEX asserts that under the existing NYNEX tariffs Centrex is a business service that includes charges for the local loop and a *bundle of central office based services. An additional charge occurs for local usage, which is available from existing local tariffs. In New Hampshire, there is no difference in business or residential local usage rates.*

NYNEX also references Paragraph 332 which states that "carriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail. This means that resellers cannot offer services or products that incumbents do not offer. The only means by which a reseller can distinguish the services it offers from those of an incumbent is through price, billing services, marketing efforts, and, to some extent, customer service. The ability of a reseller to differentiate its products based on price is limited, however, by the margin between the retail and wholesale price of the product."

AT&T bases its argument on a different section of the Act, 251[c][4][b], positing that transforming a residential customer into a business customer merely because of the use of resold Centrex represents an unreasonable restriction on resale. Section 251(c)[4](b) states that an incumbent LEC has the duty "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers".

AT&T wants to resell this business service, Centrex, to its residential customers. AT&T further wants its customer, if the customer would normally meet the requirements of a residential *customer, to be able to purchase other resold residential services from AT&T, including the local usage for that line.*

Arbitrator's Analysis

The question is whether the identity of the end user customer served by the reseller, AT&T, changes as a result of the classification of the NYNEX service that AT&T chooses to serve the customer. In other words, if a residential customer purchases residential service from AT&T as the reseller and it is provided to that customer by AT&T via resale of NYNEX's Centrex, a business only service, can only business services be added to that line even though the customer is an AT&T residential customer. According to NYNEX, this customer's line would be a business line per its existing tariffs, because Centrex is only offered as a business service. AT&T would be prohibited by NYNEX's tariff from purchasing residential services on or to a business line.

AT&T counters that the only two specific cross-class prohibitions identified in the Act are: (1) selling residential services to business customers and (2) selling lifeline services to non-lifeline customers. Since this is a case of selling a business service to a residential customer, i.e. selling a local loop, dialtone and vertical services under a business tariff, an action not prohibited by the Act, it would not appear to violate the cross-class restrictions.

Another important aspect of this argument is the ruling in paragraph 984 while discussing which Subscriber Line Charge (SLC) would apply to subscribers buying resold NYNEX services from AT&T stated, "the reseller shall pay the SLC to the incumbent LEC for each subscriber taking resold service. The specific SLC that applies depends upon the identity of the end user served by the reselling telecommunications carrier." In other words, it is the identity of the end user that determines the identity of the end user, not the identity of the resold service.

Arbitrator's Award

Classification for buying telecommunications services on a particular line is not conditioned on the tariff from which a vertical service is purchased. Rather, classification of a line follows the purpose to which it is put. Therefore, a residential customer who purchases a Centrex line resold by AT&T, for residential purposes, is not restricted to business services for that Centrex line. The only restrictions are the already discussed cross-class restrictions.

2. Decision

We do not adopt the final award of the New Hampshire Arbitrator. If AT&T buys business Centrex service for resale, it is required to buy other services associated with Centrex service at rates applicable to business customers. We base our decision on section 251(c)(4)(B) of the Act, which allows us to prevent unwarranted arbitrage by prohibiting the resale of a retail service available to a limited category of subscribers to other categories of customers. NYNEX does not permit its retail business Centrex customers to purchase ancillary services at residential rates. Therefore, AT&T is not allowed to do so.

R. Issue 31 - Terms and Terminations

1. Award of the New Hampshire Arbitrator

Issue

NYNEX wants a three year contract while AT&T wants a five year contract.

Position of the parties

Both parties agree that neither the Act nor the FCC First Report and Order addresses this issue. NYNEX is concerned that five years is too long a time to have rates in effect and instead argues for a three year contract for both parties.

AT&T argues that this interconnection contract process is too expensive and takes too long to allow the contract to remain in effect for only three years. AT&T further contends that stability is a very important issue and that five years is more appropriate as the contract applies to NYNEX. However, as the contract applies to AT&T, AT&T wants a clause by which the contract is to last no more than 60 days at its discretion.

Both parties recognized the need for continuity of service to customers of resellers even when the parties are "between" contracts. With regard to this need for continuity, both parties have agreed to use the termination language in the NYNEX-Freedom Ring interconnection contract filed in docket number DE96-290 at the NH PUC.

Arbitrator's Analysis

Addressing the minor issue first, there are a number of concerns regarding the process that will be employed to move from one contract to another. The first concern is that there can not be even the hint that the new entrant will be disconnected while negotiating in good faith simply because the current contract expired before a new one could be finalized. NYNEX immediately responded that it does not have any intention of and does not have a history of disconnecting, i.e., "SNPing" (Suspension for Non-Payment), customers of new entrants, e.g., AT&T. While this is exceedingly helpful, it can tend to put NYNEX in a difficult position if a particular party is taking advantage of this NYNEX policy and not operating in good faith. An example of this would be intentional Non-Payment of a legitimate bill for an extended period of time. In this situation, NYNEX and NYNEX customers would be forced to cross subsidize a "bad actor". The key difference in this situation is more a matter of enforcing an existing contract rather than renegotiating an existing contract in good faith. In this case, NYNEX needs the ability to quickly disconnect any party to an interconnection agreement or contract for intentional and blatant disregard for the language of the contract. Therefore, when a party misses a payment by more than 30 days per the interconnection contract and makes no substantial *effort to resolve this Non-Payment problem, NYNEX is to inform the Commission of this situation as well as the offending party. If this situation continues for another 30 days, then a second notification is to be sent to the Commission and the offending party. If the Commission has not ruled otherwise, NYNEX may disconnect the party 10 days after the Commission has received the second letter. It is the responsibility of the offending party to make its case to the Commission, not NYNEX's responsibility.*

However, this issue of SNPing may not be the relevant issue since when a contract expires, it is not an issue of non-payment, but rather an issue of non-contract. In other words, the issue is SNCing (Subscriber Non-Contract). NYNEX made an honest statement of not leaving AT&T customers "high and dry" during good faith contract renegotiations. NYNEX should be held at its word as implied above and therefore will not disconnect AT&T customers during renegotiation.

The major issue is the length of the overall contract. AT&T makes a convincing argument that the length of the contract should be of a relatively longer length because of the inherent costs and time required to negotiate these initial interconnection contracts. It is anticipated, but by no means guaranteed, that the time required for renegotiation will be significantly reduced as actual experience is gained by both buyer and seller. Therefore, the five year contract life is a reasonable award. However, NYNEX makes an equally convincing argument that the pricing components of this contract are indeed the most volatile aspects of this contract and should be able to be reset in a lesser period of time. Therefore, an award that any prices contained in the contract can be renegotiated between the parties at the half life of the contract - 2 ½ years- would be reasonable. While an argument was made that the terms of the contract were also volatile, no convincing examples were offered.

NYNEX has agreed to provide a safety net by not SNCing AT&T's customers when the most recent contract has expired and a new contract has not been signed. Therefore, the primary remaining issue is the continuity between the expiring and new contract.

The concern is that there may be an incentive for either party to manipulate the process by allowing the contract to expire and delay in implementing the new contract in order to create a "no-contract" zone that might tend to advantage a particular party. In order to prevent such a situation, the contract language can be crafted so that the new contract shall be retroactive back to the expiration of the old contract. True-ups would be required based on the new contract.

Arbitrator's Award

The award outlined above is granted. The contract will be a 5 year contract with a 2 ½ year option for renegotiation on the prices contained in the contract. In order to insure service continuity, NYNEX shall not "SNC" AT&T customers if a new contract has yet to be negotiated; it is awarded that there will be no period without a contract. This means that if there is a period of time between the end of the most recent contract and the start of the new contract, the new contract will be made retroactive to the end of the most recent contract, thus insuring continuity. This may result in a financial true-up based on the difference between the new and old prices charged during the period between the end of one contract and the first billing date of the new contract. In addition, there is an expedited process for disconnect for flagrant non payment of resellers.

This award assumes that there is a continued legal obligation to negotiate per applicable federal and state law. This award does not address whether NYNEX should be restricted from using the New Hampshire tariff change process if the results of that process might have an effect on the interconnection contract between AT&T and NYNEX.

2. Decision

We adopt the final award of the New Hampshire Arbitrator.

S. Issue 32 - Rerouting Operator Services and Directory Assistance (OS/DA)

1. Award of the New Hampshire Arbitrator

Issue Description:

Since NYNEX must make Operator Services and Directory Assistance available for resale, when, if ever, does NYNEX have to provide rerouting of Operator Services and Directory Assistance requests to AT&T when AT&T resells NYNEX basic service?

Positions of the Parties:

There does not appear to be significant disagreement on the capability of rerouting Operator Services and Directory Assistance (OS/DA) calls, recognizing that rerouting is necessary in order to accomplish rebranding as ordered in previous awards. The two solutions discussed were line class codes, which is technically available now, and Advanced Intelligent Network (AIN), which is scheduled to be available in the near future.

Arbitrator's Analysis:

As stated above, the issue is not if this can be done, because it appears that it can, but how it is to be done. This issue links with Issue 34, the award of which requires NYNEX to provide OS/DA as an unbundled resold service. Regardless of the award, however, there may be significant technical feasibility issues in the case of Directory Assistance. The technical feasibility question arises since there are free call(s) per month associated with Basic local service (5) and Centrex (1). Therefore, NYNEX would have to monitor the number of free DA calls actually used in a billing period and reroute subsequent DA calls. Therefore, the provision of unbundled OS/DA depends upon technical feasibility.

Since NYNEX must make Operator Services/Directory Assistance *available for resale and NYNEX must provide rerouting of OS/DA when it becomes technically feasible, a further issue arises. Does AT&T have to pay NYNEX for the costs involved in this arrangement? Both parties believe that NYNEX is entitled to compensation for rerouting when it is technically feasible.*

Arbitrator's Award

NYNEX must provide rerouting of unbundled OS/DA to AT&T when it becomes technically feasible. In addition, care must be taken to apply the correct discount rate to the resold local service. If for example, AT&T wants to provide all OS/DA, then the discount calculated based on AT&T supplying its own OS/DA applies. This means that all calls to OS/DA from this AT&T resold NYNEX line must be routed to AT&T by NYNEX. Technical feasibility may be a temporary problem. If however, AT&T only wants to supply OS/DA ***after*** *the "free" calls have been used, then the discount calculated based on NYNEX supplying its own OS/DA applies. This option appears to be technically infeasible at least for the near term since the number of times in a given billing period that a particular customer calls Directory Assistance must be available on a real time basis so that the switch can perform the proper routing. AT&T will compensate NYNEX for this rerouting.*

2. Decision

We adopt the final award of the New Hampshire Arbitrator.

T. Issue 33 - Service Quality and Performance Criteria

1. Award of the New Hampshire Arbitrator

Issue Description:

Should NYNEX be required to meet performance criteria for unbundled network elements and resellable services sold to AT&T by NYNEX that is different than the performance criteria NYNEX provides to its own customers? If performance criteria are not *met, should AT&T be entitled to damages from NYNEX?*

Positions of the Parties:

AT&T argues that Paragraph 314 requires NYNEX, as an incumbent LEC, to provide unbundled elements, as well as access to the unbundled elements, that is at least equal in quality to that which NYNEX provides itself. That being so, AT&T proposes a timetable to identify exactly what is to be measured, collect actual data to determine performance criteria, and then set benchmarks by which to measure performance. AT&T's proposal includes penalties for failure to meet the benchmarks.

NYNEX argues that the FCC First Report and Order does not require provision of service different from that which it provides itself and that penalties are not envisioned by the FCC. In support of this argument, NYNEX refers to a number of paragraphs in the First Report and Order. First, NYNEX cites Paragraph 312, in which the FCC concluded that `nondiscriminatory access,' as used in Section 251[c][3] of the Act, means: (1) the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element, and (2) where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides itself. Next, NYNEX goes on to cite Paragraphs 313, and 314 for essentially the same point, as well as Paragraph 970 for the "at least equal in quality" requirement with regard to resale services.

In its rules, 47 C.F.R. 51.311[a], the FCC codified the requirements established in Paragraph 313. 51.331(a) reads:

> *the quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that network element, except as provided*

in paragraph [c] in this section.

(Paragraph [c] refers to the requesting carrier requesting and receiving service superior in quality than those provided by the incumbent LEC to itself, where technically feasible, or inferior in quality if the requesting LEC solely requests such service.) In 51.603[b] the FCC codified Paragraph 970: "an incumbent LEC must provide services to requesting telecommunications carriers for resale that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the LEC provides these services to others, including end users".

NYNEX reasons that it is only required to provide service equal in quality to the service it provides itself. NYNEX proposes to provide to AT&T a monthly report that indicates the quality of service that NYNEX is providing its own customers, all companies similarly situated to AT&T, and AT&T itself. The report would provide the information with respect both to resold services and unbundled network elements. This report would allow AT&T to measure whether the service it receives from NYNEX is equal in quality to that provided by NYNEX to its own customers.

NYNEX further argues that there is nothing in the FCC rules, First Report and Order, or in the Act that definitively requires NYNEX to provide any service that is of superior quality to that NYNEX provides itself. In addition there is nothing in any of those sources which provides for damages to be paid to a requesting carrier.

Arbitrator's Analysis:

The paragraphs cited by AT&T and NYNEX are authoritative and clear-cut. NYNEX must provide services and elements which are at least equal in quality to the services and elements it provides itself. No violation of the FCC rules and First Report and Order would occur if NYNEX were to provide poor quality service, so long as all carriers including NYNEX are provided with the same (poor) quality service. The apparent purpose of the rules and intent of the FCC is to prohibit discriminatory treatment.

Therefore, an interconnection agreement which conforms to the FCC's rules can provide methods, such as the proposed monthly report, for discerning equal and unequal treatment but, absent agreement of the parties, cannot mandate standards of service.

Arbitrator's Award:

NYNEX is to provide AT&T with NYNEX's proposed monthly report card indicating the status of the quality of service NYNEX is providing AT&T, other carriers, and itself. There is no award for damages even if the quality is significantly different for a significant period of time.

This award could be interpreted that deterioration of service is now allowed, since even if NYNEX provided less than ideal service to AT&T, so long as NYNEX also provided the same less than ideal quality to its customers, there would be no violation of these rules. This certainly is not a desired outcome. The only clear way to prevent this from happening is if the New Hampshire Public Utilities Commission mandates and enforces service standards. Such action by the Commission is not precluded by the Act. While this is not part of the Award and may not be an issue today, it may be an issue to consider in the future.

2. Decision

We adopt the final award of the New Hampshire Arbitrator related to a monthly service quality report card. Maine has a Service Quality Index (SQI) as part of the Alternative Form of Regulation (AFOR) adopted for NYNEX in Docket No. 94-123. Thus we have satisfied the New Hampshire Arbitrator's suggestion that service quality incentives be adopted.

The AFOR SQI includes some categories that are not applicable to resold services which will not be included in any SQI rebate. These include Business Office Calls Answered Over 20 Seconds (%), and the four customer satisfaction categories derived from NYNEX's TELSAM surveys. The remaining two customer service categories and four current service reliability categories apply to resold services, as will the service outage category when implemented. If any SQI rebate is required under the AFOR in AFOR years beginning December 1, 1996, NYNEX shall calculate any SQI rebate applicable to local service by AT&T by excluding the above-mentioned five categories.

Any SQI rebate applicable to lines resold by AT&T shall be passed on to AT&T end use customers directly following the methodology contained in the AFOR Order at 86. As required by the AFOR Order, "[t]he rebate, if any, shall be clearly identified on customer bills as "REBATE FOR BELOW-STANDARD SERVICE QUALITY." We will not foreclose AT&T from furnishing any additional explanatory statement regarding any such rebate.

We do not adopt an AFOR SQI policy for unbundled elements purchased by AT&T, as it is not clear how many SQI categories could be applied directly, and other measurements, as suggested by NYNEX, might be more appropriate. Therefore, we will consider that policy as part of our proceeding to review limited aspects of the AFOR that will commence in Spring 1997.

U. **Issue 34(c) - Unbundling of Directory Services from Basic Service**

1. Award of the New Hampshire Arbitrator

Issue Description:

AT&T wishes to purchase Basic Service without Directory Assistance on an unbundled basis. NYNEX objects.

Positions of the Parties

AT&T bases its request on Paragraph 536 of the First Report and Order in which the FCC finds "incumbent LECs must unbundle the facilities and functionalities providing operator services and directory assistance from resold services and other unbundled network elements to the extent technically feasible."

AT&T also references Paragraph 917 in support of its conclusion that Basic Service can be detached from Directory Assistance. Paragraph 917 states:

> *"All costs recorded in 6621 (call completion) and 6622 (number services) are also presumed avoidable, because resellers have stated they will either provide these services themselves or contract for them separately from the LEC or from third parties". 47 CFR 51.609(c)(1) references costs that are avoided and shall "include, as direct costs, the costs recorded in USOA accounts ... 6621 (call completion services), 6622 (number services)...."*

NYNEX objects to AT&T's conclusion by citing a number of paragraphs in the FCC First Report and Order, including:

Paragraph 872, which, as noted in several prior arbitration awards, states:

> *"...resellers can determine the services that an incumbent LEC must provide at wholesale rates by examining that LEC's retail tariffs. The 1996 ACT does not require an incumbent LEC to make a wholesale offering of any service that the incumbent LEC does not offer to retail customers";*

Paragraph 332:

> *"More specifically, carriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail. This means that resellers cannot offer services or products that incumbents do not offer. The only means by which a reseller can distinguish the services it offers from those of an incumbent is through price, billing services, marketing efforts, and to some extent, customer service. The ability of a reseller to differentiate its products based on price is limited, however, by the margin between the retail and wholesale price of the product";*

Paragraph 953:

"With respect to volume discount offerings, however, we conclude that it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimum level of demand";

and Paragraph 970:

"service made available for resale (must) be at least equal in quality to that provided by the incumbent LEC to itself or to any subsidiary, affiliate, or any other party to which the carrier directly provides the service, such as end users. Practices to the contrary violate the 1996 Act's prohibition of discriminatory restrictions, limitations, or prohibitions on resale."

NYNEX also cites and FCC rule and a section of the Act for support. The rule is 47 C.F.R. 51.603(b):

"LEC must provide services to requesting telecommunications carriers for resale that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the LEC provides these services to others, including end users."

The section of the Act is Section 251[c][4][a], which imposes a duty on incumbent LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers;". All of these cites, according to NYNEX, lead to a conclusion that separating Directory Assistance from Basic Service is not required.

Arbitrator's Analysis

After reviewing the relevant paragraphs in the FCC order, it *is difficult to understand why the FCC allowed the unbundling of resold local services. It is clear that they did allow it, but it is unclear as to what grounds would cause them to violate their own stated rules as well as those that appear in the 1996 Act. Be that as it may, the procedure established during this process is to analyze this situation based on the resale test designed thus far.*

According to the test, three questions must be answered. Is this a retail service provided to subscribers? What exactly is the retail service? Is it being purchased by a resale eligible carrier? In this case, there is a retail service: Basic service, purchased from the local service tariff. Upon closer analysis of the tariff, i.e what exactly is the service, there appear to be two distinct parts to the local service tariff: Basic Local Service and Directory Assistance. Analysis of this anomaly of the local service tariff is required.

Analysis indicates that there may be significant linking of basic local service to other services, e.g., directory assistance. This conclusion is dictated by the difficulty encountered in attempting to define the local service tariff. It appears that the Basic local tariff is actually the Basic Local Service <u>*portion*</u> *of the local tariff, and that Directory Assistance depends on the existence of the Basic Local Service portion. The fact that five "free" DA calls are included in the Basic Local Service rate is indicated in the Directory Assistance portion of the tariff. The Directory Assistance portion of the tariff also contains the charges for any calls above the 5 "free" DA calls included in the Basic Local Service rate. However, the DA portion of the local tariff cannot be resold, even though there is a separate charge for the DA, since DA is tied to the provision of Basic Local Service. Therefore, it appears that a strict reading of the tariffs would preclude the conclusion that Directory Assistance is a separate service which can be either resold or provided by the new entrant, despite the fact that there are separate charges for Directory Assistance and despite Paragraph 917's explicit reference to resellers providing number services either themselves or by separate contract. The FCC* *order appears to be at least inconsistent and at best not fully explained in this case.*

To resolve the apparent inconsistency, it is important to turn to the 1996 Act for possible clarification. Section 251[c][4] provides some assistance. As NYNEX pointed out, subsection [a] of 251(c)(4) states that the incumbent LECs have a duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. However, subsection [b] of 251(c)(4) forbids the incumbent LEC from prohibiting the resale of a service or imposing unreasonable or discriminatory conditions or limitations on resale services, with the exception that state commissions may permit certain cross-class restrictions.

It appears, as the relevant tariff is written, that a reseller can never have the option of reselling Directory Assistance as a separate service or providing Directory Assistance on its own. This is because it appears that Directory Assistance is inseparable from Basic Local Service. This is therefore an unreasonable limitation. Per the Act and the FCC First Report and Order, this limitation must be lifted. Since this tariff probably has its origins prior to contemplation of local competition, there will need to be an opportunity to reevaluate the existing tariffs and changes made accordingly. As stated above, it was the construction of this particular tariff that was the principal driver of this award. If the tariff had been constructed differently, this award would probably have been different.

For convenience and clarity the complete resale test is included below. Although previous versions of this award added extra sections to this test, these have been removed. This issue will be treated as as exception rather than as part of the test.

Resale Test

1. Is this a retail service provided to subscribers?

2. What exactly is this retail service?

3. Is it being bought by a "resale" eligible carrier, e.g., a telecommunications carrier?

4. Is there a restriction, either explicit or implicit, that limits resale?

A. If not, no further tests are required.

B. If so, is this restriction unreasonable or discriminatory?

In determining if a restriction is unreasonable or discriminatory, the tests set forth below are required.

5A. Is the restriction due to a technical reason, e.g., network limitation? If so the restriction need not be lifted.

B. Is the restriction due to a non-technical reason? If so:

1. Does it prevent the use of another option that is otherwise available (i.e, absent the restriction), e.g., existing volume discounts,

a. If not, then the restriction need not be lifted

b. If yes, then:

1. If the restriction to be lifted creates a new service tha is not otherwise available, then the restriction need not be lifted for the reseller.

2. If the restriction to be lifted does not create a new service, the restriction needs to be lifted for resellers. It need not be lifted for the retail tariff itself; only for the restriction(s) for the reseller.

Arbitrator's Award

All of the Directory Assistance and Operator Services costs must be removed from the calculation of the wholesale discount rate applied to those services that are "tied" to Operator Services and Directory Assistance via existing tariffs, i.e., Basic Local Services. Directory Assistance and Operator Services costs need not be removed from the calculation of the discount rate applied to any other non-basic local service that is not "tied" to Operator Service and Directory Assistance. It seems unreasonable that a service not related to a specific avoided *cost should have a discount rate applied to it that includes these costs that are not avoided. Therefore, NYNEX will have 4 discount rates: business without Directory Assistance and Operator Services, business with Directory Assistance and Operator Services, residence without Directory Assistance and Operator Services. and residence with Directory Assistance and Operator Services.*

2. Decision

While we adopt the final award of the New Hampshire Arbitrator, we note that the unbundling of operator and directory services represents a departure from the express requirement of the Act (section 251(c)(4)(A)) and the FCC's general premise that only those services available at retail should be required to be sold at wholesale.[2] Nevertheless, we view this unbundling as a reasonable requirement to promote a competitive market.[3]

V. Issue 35(a) - Collocation of Switching as an Unbundled Network Element

1. Award of the New Hampshire Arbitrator

Issue Description:

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[2]Unbundling of directory services at the wholesale level calls for us to re-examine the mandatory bundling by NYNEX at the retail level (3 directory assistance calls required to be purchased as part of residential service).

[3]It is not clear that the New Hampshire Arbitrator was correct in ruling that preventing unbundling was an unreasonable limitation under section 251(c)(4)(B) as that prohibition is contingent on the service being within the scope of Paragraph A (§ 251(c)(4)(A)). Paragraph B applies only to "unreasonable limitations" on "such telecommunications service," i.e., the services under section 251(c)(4)(A) that the carrier provides "at retail . . . ."

AT&T wants NYNEX to allow collocation of AT&T's Remote Switching Modules (RSMs). NYNEX objects, arguing that housing of a new entrant's switching equipment is not contemplated as part of collocation.

Position of Parties

AT&T bases its argument on the Act's description of collocation in Section 251(c)(6). According to Section 251(c)(6), collocation is the:

> *duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier....*

AT&T then cites Paragraph 579 for the definition of "necessary" in the above section. Paragraph 579 states that "necessary," for Section 251(c)(6) means "used and useful," not "indispensable". AT&T indicated that its reason for collocating RSMs is to minimize the amount of "backhaul" for local calls. "Backhaul" would occur if RSMs are not collocated in NYNEX offices in New Hampshire, that is, all local calls would have to be transported to the "host" or stand-alone switch to be processed and then transported back to the original location for completion. Thus, AT&T argued, RSMs will be used and useful if collocated.

AT&T points to Paragraph 580 for further support of its position. Paragraph 580 states:

> *whenever a telecommunications carrier seeks to collocate equipment for purposes within the scope of section 251(c)(6), the incumbent LEC shall prove to the state commission that such equipment is not "necessary", as we have defined that term, for interconnection or access to unbundled network elements. State commissions may designate specific additional types of equipment that may be collocated pursuant to section*

241(c)(6).

NYNEX, on the other hand, argues that 47 C.F.R. 51.323[c] permits NYNEX to deny collocation of switching equipment. 51.323[c] reads: "Nothing in this section requires an incumbent LEC to permit collocation of switching equipment...".

Although NYNEX argues that 51.323[c] is definitive, NYNEX further points to Paragraph 581 for further support. That paragraph reads: "At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements."

Arbitrator's Analysis

NYNEX is correct that a plain reading of 51.323[c] could not be clearer. What is not quite so clear is the definition of switching. The ambiguity concerning switching is recognized by the FCC in Paragraph 583:

> *We recognize, however, that modern technology, has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute, that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements. We also reserve the right to reexamine this issue at a later date if it appears that such action would further achievement of the 1996 Act's pro-competitive goals.*

The apparent ambiguity that the FCC refers to is probably the same ambiguity concerning its own accounting rules regarding switching vs. circuit equipment. This ambiguity is the issue in Responsible Accounting Officer letter (RAO) 21 and one of the issues in the recently rescinded RAO 25. In each of these RAOs, the FCC's original position concerning the proper accounting of switching equipment vs. line circuit equipment was reversed by *the FCC and sent out for further comment. In RAO 21 the issue was that of distinguishing between switching (2210) and circuit equipment (2230). In RAO 25, categorization of ATM switches as circuit equipment was the issue. In RAO 21, the comments have been returned and nothing, to this date, has been heard.*

Arbitrator's Award

The deciding factor in this issue is that, as stated in Paragraph 583, mainly that there is currently a blurred line between switching equipment and multiplexing equipment. This is not a particularly new phenomenon and it is not an easy issue. RAO 21 has trouble distinguishing remote switching equipment from digital line carrier equipment. The classification of the host switching equipment is not in doubt. The key distinction may be that host switching equipment has a "central processor" while the remote switching unit has a processor, but not the central processor for the entire unit. Therefore, this award grants NYNEX authority to deny collocation of switching equipment.

Because of the continued difficulty of the FCC in distinguishing the difference between remote switching equipment and circuit equipment, subject to a final ruling by the FCC in this matter NYNEX must permit collocation of remote switching equipment. It must be understood by AT&T that if AT&T decides to collocate their RSMs in NYNEX facilities and the FCC rules that RSMs are switching equipment and the FCC does not further modify its rules in this area, NYNEX would no longer be required to allow or continue to allow the collocation of the then newly defined switching equipment. If this sounds like a risk of doing business, it is. It should go without saying that if this circumstance occurs, NYNEX can not immediately disconnect AT&T's RSM(s) without warning. There must be a reasonable transition period.

2. Decision

We adopt the final award of the New Hampshire Arbitrator. While the New Hampshire Arbitrator revised his award on this issue during hearings before the New Hampshire Public Utilities Commission, we adopt the original award. We do so because failure to require collocation may inhibit AT&T's access to unbundled network functions in some instances, and because NYNEX is able to recover any costs and to limit collocation to available space constraints. The dividing line between a remote switch and a concentration device is not clear and may depend on actual function rather than inherent characteristics. We do not consider ourselves bound by the FCC's accounting rules, however, they may ultimately be framed.

W. Issue 35(f) - Collocation - Time Table for Provision and Damages

1. Award of the New Hampshire Arbitrator

Issue Description:

Is a precise time table is not necessary for the provision of collocated space by NYNEX? If so, should there be damage assessment?

Position of the Parties

NYNEX proposes a time table based on their experience with supplying collocation cages in both New York and Massachusetts. Th proposed process is based on "best efforts" of both parties to insure completion based on the initial assessment. NYNEX's proposal does not include any assessment for damages.

AT&T pointed to Section 251[c][6] that imposes a duty on incumbent LECs to provide rates, terms and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment.... AT&T also cited paragraphs from the First Report and Order which the FCC indicated that in the FCC's experience incumbent LECs have an economic incentive to interpret regulatory ambiguities so as to delay entry by new competitors. The FCC said that, in its experience:

> *[R]eviewing the tariffs that incumbent LECs filed to implement our requirements for physical and virtual collocation suggests that rates, terms, and conditions under which incumbent LECs propose to provide these arrangements pursuant to Section 251[c][6] bear close scrutiny. We strongly urge state commissions to be vigilant in their review of such arrangements. Paragraph 569*

and

> *We and the states should therefore adopt, to the extent possible, specific and detailed collocation rules. We find, however, that states should have flexibility to apply additional collocation requirements that are otherwise consistent with the 1996 Act and our implementing regulations. Paragraph 558*

The footnote to Paragraph 569, Footnote 1387, indicates that some areas the FCC's investigations had found problematic included channel assignment, letters of agency, charges for repeaters, and placement of point-of-termination bays.

According to AT&T, the problems identified by the FCC prescribe that a time table should be awarded for cage construction and cage completion for collocation. Based on their own experience with NYNEX in New York, AT&T also felt the need for liquidated damages in order to discourage excessive delays. The delays experienced in New York resulted in financial loss due to equipment delivery and installation scheduling problems.

Arbitrator's Analysis

A timetable that each party can depend on for planning and service provisioning is essential. Based on the actual experience of AT&T in New York, it is clear that at least some financial remuneration may be in order.

Arbitrator's Award

The following schedule is awarded:

Day 1 - Application, including payment in accordance with applicable NYNEX tariff

No later than Day 10

- Detailed Cost Estimate with time commitment (16 weeks or 80 work days)

- Detailed Special Circumstances (no more than additional 3 weeks (15 work days)

Within 10 days of delivery detailed cost estimate, AT&T accepts agreement

Interval Day 1 - Acceptance of cost and committed date, including payment in accordance with applicable NYNEX tariff

Interval Day 5 - Joint Planning Meeting to:

Set milestone events and dates, e.g., Space walk through

By Interval Day 20 - Freeze drawings

Interval Day 80 (but no later than Interval Day 95) - Cage Acceptance Walkthru

If a breach of the cage construction agreement occurs, after going through the established ADR process, the schedule of contingency damages outlined below shall apply.

Within the first 12 months starting when the 1st cage construction contract is signed (interval day 1).

1st time - no compensatory damages
2nd time - compensatory damages
3rd time - compensatory damages + 10% of contract price
4th time - compensatory damages + 20% of contract price
5th time - compensatory damages + 30% of contract price

After 1st 12 months:

No free opportunity
1st time - compensatory damages
2nd time - compensatory damages + 10% of contract price
3rd time - compensatory damages + 20% of contract price

If there are no occurrences involving AT&T for a 12 month period, then this schedule is voided.

2. Decision

We adopt the final award of the New Hampshire Arbitrator. We interpret the New Hampshire Arbitrator's award to mean that if there are no violations by NYNEX of the timetable for a 12-month period, then the damages portion no longer applies.

X. Issue 35(f)(2) - Payment of Charges to NYNEX for Collocation

1. Award of the New Hampshire Arbitrator

Issue:

Should AT&T be required to pay all reasonable charges for collocation incurred by NYNEX?

Position of the Parties

NYNEX unequivocally states that AT&T must pay all reasonable charges for collocation that it incurs on AT&T's behalf. AT&T agrees that they may pay reasonable charges for collocation incurred by NYNEX.

Arbitrator's Award

It is awarded that AT&T will pay all reasonable charges incurred by NYNEX for collocation, including any special charges *required based on the type of equipment that AT&T wants to collocate provided that AT&T is informed of these charges before the costs are incurred. Reasonable charges are defined in this specific case as being based on the expanded interconnection tariff rates filed with the FCC to be replaced by NYNEX's approved TELRIC rates, which are to be available in April, 1997. Per NYNEX this use of TELRIC depends on the outcome of any judicial or regulatory determinations. NYNEX is not to allow the quality of its service to deteriorate or the safety of its personnel or customers to be put in jeopardy as a result of collocation. Therefore, NYNEX can require necessary equipment to be installed that will prevent safety and quality problems. However NYNEX must be ready to show that such preventative measures are not and have not been applied in an unreasonable and discriminatory fashion.*

2. <u>Decision</u>

We adopt the final award of the New Hampshire Arbitrator.

Y. <u>Issue 38 - Branding of NYNEX Directories</u>

1. <u>Award of the New Hampshire Arbitrator</u>

Issue Description:

Should NYNEX be required to allow branding of its published directories by new entrants?

Positions of the Parties

NYNEX asserts that there is nothing that requires the branding of adjunct services such as directories. According to NYNEX such branding is clearly outside the scope of the Act. On the other hand, AT&T states that there is no clearer branding for a customer than the telephone directory and without branding their service will not be equal in quality as required by Section 251[c][4] and 47 C.F.R. 51.603[b].

Arbitrator's Discussion

This issue is not whether a description of the new entrants should be included inside the information section of the directory, similar, perhaps, to the section on long distance carriers. NYNEX has already agreed to this. The issue is whether NYNEX should be required to put AT&T's logo on the front cover of its published telephone directory or, in the alternative, to remove its own logo from the front cover. The alternative scheme would result in a directory bare of logos anywhere on the front cover.

Currently, all NYNEX New Hampshire directories appear to be "combination" directories, that is, with both white and yellow page directories combined. Upon reading the logo on the front cover of the Concord NYNEX published directory, the logo appears to be that of NYNEX Yellow Pages with only a small reference indicating "with White Pages". Regulation of the contents of the front cover of Yellow Pages is outside the scope of the Act and FCC order.

Arbitrator's Award

NYNEX is not required to "brand" the cover of its published directory.

2. Decision

We adopt the final award of the New Hampshire Arbitrator.

Z. Issue 40 - TELRIC

1. Award of the New Hampshire Arbitrator

Issue Description:

Determination of the rates for unbundled network elements per TELRIC methodology

Position of Parties and Arbitrator's Analysis

Both AT&T and NYNEX filed TELRIC studies. The results, models and underlying methods were different. There was not sufficient time to definitively determine if both, one or none of the studies actually satisfied TELRIC requirements. This should not be too surprising since other regulatory bodies, notably the FCC and the Federal-State Joint Board have been looking at models for more than a few years. Neither of these regulatory bodies have been able to certify a single model. This includes the FCC which has specifically been reviewing TELRIC models. Given the extremely short time frame to review these studies, approximately one week, it is not surprising that neither model was able to be certified by this process.

To further compound the issue, a careful reading of the relevant sections in the FCC rules, FCC order and 1996 Act were less than clear in their definition of TELRIC. This lack of specificity, the newness of these procedures and the extremely short time frame in implementing these requirements, including TELRIC did not minimize this already difficult process. As was stated repeatedly during the entire process, the final report is due to the commission on November 8, 1996.

The TELRIC studies for New Hampshire were not completely ready until the week of October 21. Since the 21st was a holiday, the 22nd was a more accurate first date. Additional information was supplied by both parties during the week and each party had the limited opportunity to request further information.

The face-to-face meetings began on the week of October 27. It became quickly apparent that the approaches employed by NYNEX and AT&T were radically different, both in the final answers and the methodologies employed. The stark differences in the methodologies employed made it extremely difficult to compare the two models. AT&T in general appeared to calculate the total costs of their network components and then divided by the total demand for the network component to develop a per unit cost. On the other hand, NYNEX in general appeared to calculate the per *unit cost in the beginning so as to make it extremely difficult to provide the totals underlying the model. Therefore it was exceedingly difficult to consistently compare the total forward looking costs as well as the demand quantities underlying the rates that were calculated. These costs included such items as total forward looking investment by element, total forward looking expenses by element, and a reasonable projection of the number of units by element. This seems to be a reasonable interpretation of 47 CFR 51.511.*

On the rare occasions where totals were available, the differences between NYNEX TELRIC, AT&T TELRIC and NYNEX embedded (based on ARMIS) costs were eye opening. For example in switching, NYNEX TELRIC was nearly three times the NYNEX embedded costs and AT&T TELRIC was less than half the embedded costs. This was the most extreme example, but it did indicate that there was not time to redo or rerun the models.

The per unit costs also appeared to be different on occasions but also surprisingly similar on occasions between the two models. There was not time to further explore this issue.

Efficient Network Configuration

Per 47 CFR 51.505, one of the requirements of TELRIC is that it represents an efficient network configuration. A requirement for these proceedings was that the model represented a fully functioning network with at least the same level of service quality as exists today. First of all neither party provided a map of the entire state that indicated the explicit network configuration, including switch type, generic, trunk configurations including cable and transmission capacities and equipment, loop configurations including cable and transmission capacities and equipment. There were general representations, but neither party provided specific information. Even the general network differences were significant.

For example, NYNEX assumed that the basic switching architecture would be approximately what it is today - extensive *use of host/remote switches. AT&T's model treated every switch location as a stand alone switch, including remotes. The problem with this seemingly small difference is that the facilities between host and remote locations may have been treated in NYNEX's model as part of the host/remote switching complex, while the AT&T model would treat these same facilities as normal trunks. This may in part explain the difference in the switching costs between NYNEX and AT&T. NYNEX's model may have included the costs of the trunks between the host/remote units as a part of switching, while AT&T's model did not. Logically this would have caused NYNEX's switching costs to be higher than AT&T's.*

Another major difference in network configuration between the two models was the use of fiber in feeder trunks. NYNEX's model used fiber in all feeder while AT&T's model did not start to use fiber unless the feeder was over 9,000 feet in length. It was pointed out by AT&T that no other RBOC followed this configuration, but NYNEX responded that this was most efficient and was in keeping with their generally accepted network principles. There was insufficient time to further explore this area.

The above situation led to the accusation by AT&T that NYNEX's TELRIC recovered costs for a non-regulated video network that just happened to carry regulated voice traffic. NYNEX countered that this network was indeed extremely efficient for voice only traffic and for the "forward looking' services anticipated for this forward looking network. Once again there was insufficient time to further explore this potentially significant difference in network architecture.

In summary a determination could not be made on exactly what the specific configuration for the state of New Hampshire was underlying each model. While it appeared that the AT&T model was able to develop some numbers relating to the specific topology underlying the TELRIC study for New Hampshire, neither model was able to be fully verified in the length of time available. Therefore it could not be determined whether both, one or neither of the models reflected efficient network configuration.

Furthermore, it could not be determined whether both, one or neither of the models would actually produce a fully functioning network providing service at least equal to today's service quality.

In order to begin to better understand the two TELRIC models, the following worksheet would have needed to be completed by each party. Unfortunately there was not sufficient time.

TELRIC questions

Logically TELRIC models need to answer these questions. Different models will answer them in different ways, but these macro steps should be calculated somewhere in the models.

"Bare" (unloaded) price of each component of the "modeled" network topology

1. Calculate "actual" demand on each component of "modeled" network topology, e.g., # loops, # minutes

2. Apply "fill" factor (breakage point) to "buyable units of a particular network component of the network topology to establish "able to buy" capacity of the unit for that particular network component of the network topology

1800 pr cable @ 80% "fill" yields 1440 pr breakage point or "able to buy" capacity

3. Apply utilization factor (50%) to "actual" demand to determine "wanting to buy" capacity of the particular network component of the network topology

700 actual subscribers (loops) @ 50% utilization yields 1400 "wanting to buy" capacity

4. Match "wanting to buy" capacity per unit of the particular network component of the network topology to the "able to buy" capacity of unit of the particular network component of the network topology so that "wanting to buy" is less than or equal to "able to buy".

5. Apply price of appropriate "able to buy" unit to particular network component of the network topology.

6. What capacity was used as the denominator to calculate the unit price? 1800, 1440, 1400, 700

"Loaded" cost of particular network component of the network topology

Two basic types of "loaded" costs

Type 1. Directly related to cost of the "bare"(unloaded) investment of the particular network component of the network topology, regardless of the cost of the "bare" (unloaded) investment e.g., depreciation. This relationship would never have to be recalculated if the "bare" (unloaded) investment level changes because it is constant.

Type 2. Related to a particular cost level of the "bare" (unloaded) investment of the particular network component of the network topology. The relationship is a particular amount of "loadable" cost to a particular amount of "bare" investment. Examples are plant specific, corporate operations, etc. This relationship must be recalculated if the "bare" investment level changes significantly.

Questions to be answered for each model

1. How does the model handle "bare" investment steps 1-5. Need to tie to exhibits already supplied. Two types, if appropriate, "basic" joint network element, loop and local switch and dedicated element, OC-12. Please provide for subscriber loop, local switch and a dedicated element

2. Calculation of "loaded" costs factors.

Type 1 - If other than depreciation, please explain why

Type 2 - Provide basis of calculation

It was at this time that it became apparent that neither model was going to be able to be changed significantly except for preprogrammed inputs. While it appeared that the AT&T model was more flexible in this area than the NYNEX model, neither were able to be changed significantly. The two inputs, depreciation lives and cost of capital, that will be decided by the state commissions were able to be adjusted in each model. Therefore the next step was to award the depreciation lives and cost of *capital.*

Economic depreciation lives

NYNEX appeared to want shorter depreciation lives for almost all of their investment. AT&T wanted longer lives. When compared with the range of depreciation lives established by the FCC and the New Hampshire specific lives, generally the NYNEX lives were below both. The AT&T depreciation lives were generally within the range established by the FCC and close to those of the New Hampshire specific lives. One problem with comparing the rates of the two companies was the issue of salvage value. It appeared that each party treated salvage differently, either included in the depreciation life or as a separate factor. It did not appear to be a significant problem that could not be handled through a translation, but rather indicated that each model handled depreciation lives differently once again making quick comparisons difficult in a short time period. It was interesting to note that NYNEX - New Hampshire current interstate depreciation rates for cable and wire facilities investment are not at the most aggressive level in the range set by the FCC.

Forward looking cost of capital

In a nutshell, NYNEX argued for a higher overall cost of capital of 13.178 % while AT&T argued for a lower nominal cost of funds in the range of 9.2% to 10.6%, or more specifically 9.8%. The arguments centered around some technicalities, but in the end the issue was the measurement of risk, in particular the relationship between depreciation lives and risk. One of the technicalities was how the various parties viewed "short term" risk. NYNEX appeared to rely on the assumption that the current forecasted earnings growth of the S&P Industrials is maintained forever, while AT&T appeared to rely on the assumption that the current forecasted earnings growth will last for five years and then converge on the long-run growth rate of the economy at the 20th year.

Arbitrator's Award

There are five basic awards: depreciation rates, cost of capital, "mid-point" methodology of the two differing models, the resulting rates and the certification of the submitted TELRIC studies.

In paragraph 702 of the First Report and Order, the FCC stated that "the current authorized rate of return at the federal or state level is a reasonable starting point for TELRIC calculations, and incumbent LECs bear the burden of demonstrating with specificity that the business risks that they face in providing unbundled network elements and interconnection services would justify a different risk-adjusted cost of capital or depreciation rate". In order to start to solve these interrelated issues, depreciation was the first issue to be addressed.

Depreciation

Because of the lack of time and the complexity of the models it was decided that the depreciation rates needed to be either AT&T's or NYNEX's. Mixing rates or selecting new ones would cause unnecessary problems especially because, as stated above, the two models handle salvage differently. If other than either of these two rates were selected, then these "other" rates would have to be converted. Time constraints did not make this a viable alternative. Based on paragraph 702 and the fact that NYNEX - New Hampshire interstate depreciation rates are not currently set at the most aggressive level within the FCC prescribed range gives the indication that the current rates may be a reasonable starting point. In addition the current competitive situation does not appear to be enough to cause NYNEX - New Hampshire to set their interstate depreciation rates for cable and wire facilities (account 2410) at the lowest possible lives within the FCC range of lives. This gives the impression that the economic lives of cable and wire facilities are longer than the current depreciation lives.

The NYNEX proposed economic lives appear to be consistently lower than the current depreciation lives while the AT&T lives *appear to generally follow the current depreciation lives, with some lower and some higher. Since this contract can be reopened for rate purposes in 2 ½ years, and there was not a sufficient showing of increased risk in this 2 ½ year time frame by NYNEX, there was little reason to award the lower depreciation lives supported by NYNEX. Instead the depreciation rates proposed by AT&T are awarded.*

Cost of capital

The logic underlying the NYNEX cost of capital studies that the current earnings growth would last forever (20 years) was less persuasive than that presented by AT&T. However once selecting the AT&T methodology, the output needed to be adjusted for the increased risk inherent in the longer depreciation lives selected above. It appeared that neither party's cost of capital studies factored in the depreciation rate used in the same study. Since the longer depreciation lives proposed by AT&T were awarded above, it would appear that there would be more risk than if the investment were written off over a shorter time frame and that the AT&T cost of capital would need to be adjusted to the higher range.

As stated above AT&T's range was 9.2% to 10.6%. Since the higher end of the range appears more consistent with the risk associated with the previously selected lower depreciation rates, the 10.6% cost of capital is awarded. The specifics that are awarded are as follows:

7.8% Cost of debt
12.9% Cost of equity
45%/55% Debt/Equity ratio
10.61% Overall cost of capital

While not being offered as an excuse, it must be noted that above decision was rendered less than 2 hours after the last witness had finished. This was the last day of scheduled meetings and a decision had to be made so that the parties could run their respective models over the weekend in order to allow *further discussion on the resulting numbers. Further analysis may have allowed for more options to be considered.*

"Mid-pointing" Methodology

The following table shows the result of the rates based on the above awards. The next step was to look at the differences and then "mid-point" the rates. As stated above, the individual models were not able to be analyzed sufficiently to bring closure between them, assuming that closure could ever be accomplished.

AT&T's TELRIC model developed a significantly different set of rates and different rate structure than that proposed by NYNEX. Through negotiations between the parties, they agreed to use the rates where there was agreement between the two models, not in level but in structure and element. For example AT&T had one "loop" element with 6 "density" zones while NYNEX had four "loop" elements (two-wire analog voice grade; four-wire analog voice grade; two-wire conditioned for digital; and four-wire conditioned for digital) with 3 "density" zones. After considerable discussion, AT&T agreed to the rate structure proposed by NYNEX. This meant that there would be the 3 "density" zones and there needed to be a single set of NYNEX rates that can be legitimately compared to a single set of AT&T rates so that these two rates can then be "mid-pointed". The change in NYNEX's single set of rates due to the "mid-pointing" is then applied to the other related sets of rates. In the above example, the comparable rate to AT&T's "total" loop element is NYNEX's 2-wire analog voice grade "total" rate. This rate is then "mid-pointed" with AT&T's "loop" rate and the resulting difference in NYNEX's 2-wire analog voice grade rate is first applied to the "density" zones associated with the 2-wire analog voice grade rate and then applied to the other related "loop" elements and density zones.

The following table shows the "matching" NYNEX and AT&T rates, the "mid-point" and the resulting % change.

TELRIC RESULTS

NYNEX	***AT&T***	***Mid Point***	***% Change***
*2 Wire Analog - State Wide Average**			
*$18.92**	*$16.14*	*$17.53*	*-7.35%*
Apply to other loop charges			
NID - 2 wire NIDs			
*$0.93**	*$0.46*	*$0.70*	*-24.7%*
End Office - Port - Analog			
*$2.81**	*$1.20*	*$2.00*	*-28.80%*
End Office - Port - Digital			
*$3.98**	*$1.70*	*$2.84*	*-28.6%*
			Applies to ISDN-BRI
End Office - Port composite applies to port additives (28.7%)			
End Office - Trunk Port - Digital			
*$10.50**	*$3.40/tk port*	*$6.95*	*-33.80%*
Apply to Trunk port MOU and ISDN-PRI			
End Office - Usage			
*$0.011384**	*$0.00203/MOU*	*$0.00671*	*-41.1%*

Port Additives at 28.7% (mid point EO- Port - Analog and EO- Port- Digital)

Transport			
Tandem Switching			
*$0.00902***	*$.00260*	*$.00581*	*-35.6%*
Apply to all tandem elements p7 of 7			
***NYNEX - composite of state and type*			
Common Transport			
$0.00080	*$0.00105*	*$0.00092*	*+15.0%*
Does not apply to any other element except time of day			

Interoffice Dedicated Transport (@ 20 miles average @ DS-1 on DS0 *equivalent)*

Dedicated (per DS0)

$4.82	*$4.16*	*$4.49*	*-6.8%*

Applied to all Interoffice Dedicated Transport and SS7 link

Signaling System 7 (SS7)
Link

$41.77	*N/A*	*N/A*	*-6.8%*

Why not difference of dedicated transport therefore use dedicated transport (-6.8%)?
Agreed to use dedicated transport % change

STP

Calculate total costs (NYNEX and AT&T) and apply to all STP charges

$2,289,509	*$640,434*	*$1,464,972*	*-36.0%*

To be applied to STP Port rate

SCP
LIDB+800 (/query)[2 messages/query]

$0.001176	*$0.00200*	*$0.00159*	*+35.2%*

Applied to SCP rate structure

Rate award

The above "mid-pointing" procedure and application to related rates is awarded. Attached is the rate sheet that was calculated by and provided by NYNEX and has applied these principles. These rates are also awarded.

Submitted TELRIC studies

As stated above there was not sufficient time to determine if both, one or neither of these studies comply fully with TELRIC methodology. However, it is assumed that since both of these studies are represented to be TELRIC compliant, to the same *extent, the "mid-point" process should also be TELRIC compliant and result in rates that are based on TELRIC methodology.*

2. Decision

We will adopt, on an interim basis, the method used to calculate TELRIC rates for unbundled network elements adopted in New Hampshire. Those rates are based on New Hampshire-specific cost inputs. We consider NYNEX's and AT&T's positions on interim rates as an agreement that we should adopt those rates on an interim basis. Therefore, it is not necessary at this time to determine the issues of the appropriate Maine-specific depreciation rates and cost of capital for use with Maine TELRIC costs. As discussed below, there is no agreement concerning how long those rates should remain in effect. We do not, however, adopt deaveraging by geographic density zones, and instead permit rates to be calculated on a state-wide average basis.

NYNEX states that it "would not expect Maine-specific TELRIC results to be significantly different from New Hampshire." AT&T did not comment on whether it thought results would not be significantly different.

AT&T and NYNEX differ on the length of time that interim rates should be effective. AT&T suggests that the Commission initiate a proceeding for establishing long-term rates (based on Maine-specific costs) over the next six months. NYNEX believes that we should wait until after a decision by the U.S. Court of Appeals for the Eighth Circuit. NYNEX states that it "is reluctant to commit resources of the Company, intervenors and the Commission to the production and review of a cost study premised on a methodology which may not be sustained on appeal and may ultimately be discarded as the basis for pricing unbundled network elements." The timeframe for final adjudication of the Interconnection Order may be lengthy. In its exceptions, NYNEX states that the resources necessary to provide Maine-specific inputs to produce Maine rates using the New Hampshire methodology (the mid-points between the AT&T and NYNEX studies) would be substantial. It does not draw a comparison between that effort and the resources that would be necessary to litigate the proper costing methodology.

In adopting the New Hampshire Arbitrator's decision, we adopt his finding that it was not possible, because of time constraints, "to determine if both, one or neither of these studies comply fully with TELRIC methodology." He also stated that "the individual models were not able to be analyzed sufficiently to bring closure between them, assuming that closure could ever be accomplished." Accordingly, he ordered "mid-pointing" between the two studies.

In addition to the time constraints, it is not clear that there is a sufficient basis in the record to establish the validity of either of these models, either under the TELRIC methodology ordered by the FCC or under any other reasonable definition of "cost" under 47 U.S.C. § 252(d)(1) (for interconnection and network elements) or "additional cost" under section 252(d)(2) (transport and termination of traffic). Accordingly, we make no finding in that regard. We consider both the proper definitions of those statutory terms and the methodologies for determining those costs under those definitions to be open questions. The parties and the Arbitrator in New Hampshire agreed that they should continue to apply the Interconnection Order and regulations that purported to govern pricing, notwithstanding the Eighth Circuit stay of those provisions, and that each party would reserve its rights to argue for different methodologies if the courts ultimately decided that the FCC had no authority to enact pricing rules, or its order was reversed on other grounds. Because we have largely adopted the interim pricing decisions proposed by the New Hampshire Arbitrator, we consider our decisions to be subject to reconsideration if the FCC order and regulations are vacated or reversed.

There are two possible bases for further Commission jurisdiction over those issues. First, the Commission on its own motion may reopen the proceeding pursuant to the provisions of 35-A M.R.S.A. § 1321. Although that section does not specifically permit a party to move for reconsideration, any party may request the Commission to exercise its discretion. Second, either party may serve the other with a request for negotiation under 47 U.S.C. § 252(a) and present any agreement to the Commission under section 252(e), or, if negotiations are unsuccessful, petition the Commission for arbitration under section 252(b).

We believe the interim rates should be replaced by Maine-specific rates, even if we use the same mid-point methodology (averaging the results produced by the two existing cost models filed in New Hampshire) used by the Arbitrator in New Hampshire. We therefore rule that the TELRIC rates established under Issue 40 shall be in effect for at least six months and for an indefinite term thereafter. In other words, while it is possible prior to six months from the date of this Decision for a party to request this Commission to reexamine the interim rates, we are unlikely to entertain such a request, at least under 35-A M.R.S.A. § 1321, until after that time, and we request parties to exercise discretion in making a request after six months. For example, if the Eighth Circuit has not issued its decision by then, it may be advisable to wait at least until that decision.

In the New Hampshire and Vermont reservation agreements NYNEX and AT&T agreed that interim rates should be subject to a true-up, i.e., "permanent" rates should be applied retroactively. NYNEX has indicated a willingness to have a true-up. AT&T opposes any true-up, at least prior to September 30, 1997. Because there is likely to be a small amount of resale in the next several months, we will not order a true-up at this time, but will revisit this issue no later than September 30, 1997.

Similarly, we will not require deaveraging by geographic location (into three zones or otherwise) at this time. We will reconsider that issue no later than September 30, 1997. We agree with NYNEX that until the questions of federal and state universal service support and the possible deaveraging of retail rates are settled, it is not appropriate to require deaveraged wholesale rates, because they might lead to arbitrage when its retail structure remains averaged.[4]

The New Hampshire Arbitrator, as part of his award on Issue 40, adopted a spreadsheet containing Unbundled Network Element Prices (Adjusted) as revised on November 18, 1996. That spreadsheet, which appears at the end of the New Hampshire Arbitrator's award on this issue, includes statewide prices on pages 1 and 4 through 6 of the spreadsheet (as well as zoned prices for those and other categories). NYNEX shall calculate statewide prices for switching port elements on pages 2 and 3 of the spreadsheet, using New Hampshire cost inputs and applying the same principles that were used for calculating statewide prices for other elements in the spreadsheet. Those statewide prices shall be filed at the same time as the Agreement that must be filed as described in Part I.

[4]We do not agree with AT&T that NYNEX has waived this argument by failing to raise it until its exceptions (or in New Hampshire until a similar stage). Prior to exceptions, our procedures allowed parties to comment only on issues they considered specific to Maine or to address issues raised by the Examiner.

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AA. Issue 41 - Mutual Compensation

1. Award of the New Hampshire Arbitrator

Issue Description:

The issue here is whether Bill and Keep should be adopted as the procedure for reciprocal compensation of transport and termination of telecommunications between AT&T and NYNEX for an interim period, i.e. during transition to a fully competitive market. In addition, if bill and keep is not awarded, should TELRIC rates apply?

Positions of the Parties

According to the Act, Section 251(b)(5), all LECs have a duty to establish reciprocal compensation arrangements for recovery of the costs associated with transport and termination of calls originating on other carrier's facilities. The charges for termination are to be based on a "reasonable approximation" of the additional costs of terminating such calls, Section 252(d)(2). One method of reciprocal compensation is the so-called Bill and Keep method. Bill and Keep was defined by the FCC, in Paragraph 1096 of the First Report and Order, as arrangements in which neither of two interconnecting networks charges the other network for terminating traffic that originated on the other network. AT&T argues in support of Bill and Keep; NYNEX argues against it.

Per NYNEX Pursuant to Paragraph 1111 of the First Report and Order, as well as 47 C.F.R. 51.713, Bill and Keep is only permitted if the traffic between two carriers is in balance, that is, when (1) the volume of traffic is roughly equal and expected to remain so, and (2) the presumption of symmetrical rates has not been rebutted. NYNEX traces support for this two part test through numerous paragraphs. NYNEX argues that this two part test is not met in New Hampshire and that therefore Bill and Keep is not permitted.

Citing Paragraph 1085, NYNEX argues that the FCC has adopted incumbent LECs' current transport and termination prices as presumptively reasonable t & t prices for other, competing, carriers. In Paragraph 1086, the FCC concluded that imposing symmetrical rates based upon the incumbent LEC's transport and termination prices will not substantially reduce carriers incentives to minimize those costs. NYNEX also points to Paragraph 1089 where the FCC states that "in the absence of... a cost study justifying a departure from the presumption of symmetrical compensation, reciprocal compensation for the transport and termination of traffic shall be based on the incumbent local exchange carrier's cost studies". Therefore, NYNEX argues, symmetrical rates are established-- those based on NYNEX's current transport and termination rates, meeting the first part of the test. NYNEX asserts, however, that the second part of the test is not met because the volume of traffic is not roughly equal.

Pointing to Paragraph 1089, NYNEX argues that the FCC itself found that traffic flow is unequal. In Paragraph 1086, the FCC said: "We expect that incumbent LECs will transport and terminate much more traffic that originates on their own networks than traffic that originates on competing carriers' networks." and "...the LEC's revenues from terminating traffic originating from another local carrier are based on the net difference in traffic, which is likely to be much smaller than the total traffic it terminates."

AT&T argues that Bill and Keep is not precluded. AT&T points to paragraph 1113 that concludes that states may

> *"If state commissions impose bill-and-keep arrangements those arrangements must either include provisions that impose compensation obligations if traffic becomes significantly out of balance or permit any party to request that the state commission impose such compensation obligations based on a showing that the traffic flows are inconsistent with the threshold adopted by the state. <u>States may, however, also apply a general presumption that traffic between carriers is</u>*

> *balanced and is likely to remain so.* In that case a party asserting imbalanced traffic arrangements must prove to the state commission that such imbalance exists. Under such a presumption, bill-and-keep arrangements would be justified unless a carrier seeking to rebut this presumption satisfies its burden of proof". (Emphasis added.)

AT&T also pointed to 47 CFR 51.713[c], which states:

> *"nothing in this section precludes a state commission from presuming that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption".*

On the basis of the above language, AT&T argues that Bill and Keep is permissible if the state makes the presumption and it is not rebutted.

In addition to arguing that Bill and Keep can be imposed so long as traffic is presumed to be in balance, AT&T argues that Bill and Keep can be imposed even without traffic balance. Bill and Keep has benefits, due primarily to the relief from costly recording and billing measures which would otherwise be required of a new entrant, which make it clearly in the public interest. Competition will best be encouraged by Bill and Keep. If Bill and Keep is not adopted, the costs for measuring and billing could be proportionately higher for the new entrant on a per unit basis because of the low start up volumes. This burden, AT&T argues, puts AT&T at a competitive disadvantage.

Both parties agree if Bill and Keep is not adopted, charges for transport and termination would be based on TELRIC rates.

Arbitrator's Analysis

In paragraph 1055, the FCC outlines three options for establishing transport and termination rate levels. The options are:

1) The TELRIC-based methodology outlined in the section on the pricing of interconnection and unbundled elements.

2) The default prices pursuant to the default proxies.

3) Bill and Keep, in certain circumstances.

AT&T and NYNEX agree that if traffic is found to be in balance, Bill and Keep can be awarded. The issue is whether Bill and Keep is permitted if traffic is not found to be in balance.

Based on the FCC order and rules, a finding of traffic balance is required before bill-and-keep can be awarded. It also seems exceedingly logical. Therefore, the issue of traffic balance needs to be answered.

While the FCC allows a presumptive finding that traffic is in balance during a short period of time until more definitive traffic studies can be performed, it does not appear reasonable that there can be traffic balance--either in a start-up period or in the future. The only possibility of achieving traffic balance is if the distribution of customers of the new entrant, in this case AT&T, were to be precisely equal to the distribution of customers remaining with NYNEX. The customers being distributed would also have to have the same local calling habits. As stated above, this appears to be highly unlikely, if not impossible. In addition, it would seem that balanced traffic is even more unlikely in the start-up period due to the small number of customers of the new entrant, especially given the emergence of "one way" services such as Internet Service Providers and their customers.

Imbalance is even more likely today. In order to have local traffic balance, it must be assumed that AT&T will attract only "average local usage" customers. Despite AT&T's assertion that it wants to serve the entire state beginning on its first day of operation, the ability of AT&T to attract only "average local usage" customers, even assuming there will be no attempt to target specific types of customers, is remote at best.

One of the primary concerns expressed by AT&T was that the *costs for measuring and billing could be proportionately higher for the new entrant on a per unit basis because of the low start up volumes. One way to minimize costs is discussed in Paragraph 1114 where the FCC noted that state commissions may require that local traffic and access traffic be carried on separate trunk groups, if they deem such measures to be necessary to ensure accurate measurements and billing.*

Arbitrator's Award

To permit Bill and Keep, traffic must be found to be in balance or a presumption must be established that traffic is in balance. Given the finding that traffic will not logically be in balance for the transport and termination of local traffic between AT&T and NYNEX, Bill and Keep is not awarded.

In order to lessen any disproportionate costs for either AT&T or NYNEX, both NYNEX and AT&T are encouraged to use "best efforts" to institute the least costly means to accomplish mutual billing accurately. While CABS (Carrier Access Billing System) type billing may be an ultimate objective, this could be overly costly on a per unit basis for the new entrant with this potentially low priced service. Therefore, "best efforts" must be taken to reduce these costs, up to and including, at the new entrant's choice, the use of separate trunk groups for local traffic and access traffic. These trunks can be one way for ease and accuracy of measurement, at the request of the new entrant. Whatever trunk arrangement is requested by the new entrant, the new entrant must also offer this same arrangement for its traffic terminating to the incumbent. In other words, if AT&T wants separate one way trunks for terminating local traffic from NYNEX, AT&T must also be willing to provide separate one way trunks for terminating its local traffic to NYNEX, if NYNEX so requests.

Tied to the above discussion on direct trunk groups, there is another concern that has not been directly discussed above, mainly the effect of a minute sensitive rate for transport and termination of local telecommunications on traditionally flat *rated basic local service. It seems clear that if there are two or more local networks that charge each other on a per minute basis for terminating the others' local minutes, that this may put significant pressure to make basic local service pricing consistent and thus get rid of flat rated basic local service. While this may certainly be an intellectual outcome, it may not be required. For example it may prove more efficient to institute a "flat" transport and termination rate based on trunk capacity. This would give some traffic sensitivity but may retain the flat local rate. This is not the issue here, but may need to be addressed in the future.*

Since Bill and Keep is not awarded, per the above mentioned agreement of both parties, the charges for transport and termination will be the appropriate TELRIC rates.

2. Decision

We do not adopt the final award of the New Hampshire Arbitrator. We find that Bill and Keep is simpler and appropriate under the circumstances. We do not agree with the New Hampshire Arbitrator's finding that an imbalance in traffic is likely to occur.[5] The Arbitrator found that the

> only possibility of achieving traffic balance is if the distribution of customers of the new entrant, in this case AT&T, were to be precisely equal to the distribution of customers remaining with NYNEX." The customers being distributed would also have to have the same local calling habits. . . . In order

[5]The FCC's regulation regarding Bill-and-keep arrangements for reciprocal compensation, 47 C.F.R. § 51.713 has been stayed by the Eighth Circuit. Nevertheless, we agree with the FCC and the New Hampshire Arbitrator that Bill-and-keep arrangements are appropriate only where "the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic pulling in the opposite direction, and is expected to remain so . . . ."

> to have local traffic balance, it must be assumed that AT&T will attract only "average local usage" customers.

We do not agree that AT&T must "attract only 'average local usage' customers." Rather, AT&T need only attract a mixture of customers that, on an overall calling basis, are likely to have similar calling patterns to NYNEX customers; if so, there will be a rough balance. We do not see any reason why the overall combined (originating and terminating) traffic flowing from AT&T to NYNEX will not be roughly similar to the overall amount of traffic (combined originating and terminating) flowing from NYNEX to AT&T.

We accept AT&T's position on this issue, including its proposal that we will make a prospective adjustment if, after six months, there is in fact an imbalance that is greater than 10% in either direction.

Accordingly, it is

O R D E R E D

1. NYNEX shall file whatever costs may be necessary consistent with this Order by December 13, 1996.

2. NYNEX and AT&T shall jointly file for the Commission's review and approval, contract language and other agreements necessary to implement the decisions on all issues stated in this Order. The Commission shall issue its decision on all outstanding matters necessary to implement the decisions herein within 30 days of the filing of such contracts and agreements.

3. The Administrative Director shall make a copy of these decisions available for public inspection and copying within ten days of the date of this Decision, pursuant to 47 U.S.C. § 253(h).

Dated at Augusta, Maine, this 4th day of December, 1996.

BY ORDER OF THE COMMISSION

Christopher P. Simpson
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Hunt

This document has been designated for publication.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R. 110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission to the Maine Supreme Judicial Court, sitting as the Law Court, is not available, because such review is prohibited by 47 U.S.C. § 252(e)(6).

3. Review of this discussion is available to an aggrieved party by bringing an action in federal district court, as provided in 47 U.S.C. § 252(e)(6).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.